2008

Gene M. Richards v. Resource Technics, LLC : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GENE M. RICHARDS	:	
	:	
	:	**APPELLATE COURT NO. 20080910**
RESPONDENT/APPELLANT,	:	
	:	**THE HONORABLE JUDGE CHRISTIANSEN**
vs.	:	
RESOURCE TECHNICS, LLC	:	**REQUEST FOR ORAL ARGUMENTS**
a Nevada based corporation	:	
and *et all*	:	**REQUEST FOR PUBLICATION**
PETITIONER /APPELLEE.	:	

APPELLANT'S REPLY BREIF

LIST OF PARTIES

PETITIONER/APPELLEE	RESPONDENT/APPELLANT
RESOURCE TECHNICS, LLC	GENE RICHARDS

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State v.Ruiz **2009 UT App 121, (May 7, 2009)**

Wall v. Wall **2009 UT App 129, (May 14, 2009)**

STATUES

Utah R.of Appellate Procedure Rules 24, 26, AND 2.

Utah R. of Appellate Procedure Rule 54(a)

Utah R. Appellate Procedure Rule 35(c)

Utah R. Civil Procedure Rule 4-20

ARGUMENTS

POINT I
APPELLEE'S FAILED TO COMPLY WITH *UTAH RULES Of APPELLATE PROCEDURE RULES 24, 26, AND 27.*

On May 13, 2009 an Order from the Utah Appellate Court was mailed to the Appellant and the Appellee's because Appellee's failed to submit the electronic courtesy brief to both the Utah Appellate Court and also to the Appellant. In addition to this Appellee's error, Appellee also filed with the Utah Appellate Court their response briefs bound with a spiral binding when the *U.R.A.P.* Rules specifically require a Vello binding.

Appellee's counsels have been Officer's of the Court for several years, and should be held to the highest standards governing this Office. Pursuant to *UR.A.P.* Rule 27, failing to file and mail the electronic brief is considered untimely and therefore the Appellee's brief should be rejected. (Attached hereto as Exhibit A, Order).

POINT II
APPELLEE'S ARGUMENTS ARE MOOT AND WITHOUTMERIT REGARDING NO RECORD OF PROCEEDINGS.

Richard's requested and audio or video transcript through the Recorder's Office, therefore this argument from the Appellee's is without merit and is moot. (See Exhibit A, and B, Appellant's Brief). Once again the Appellee's are trying to confuse the issues of the Court through smoke and mirrors just as they have throughout all of the proceedings. There is no audio or video to support issues and facts of the case of Summary Judgment in the amount of $53,656.58, (see Point V, infra.) which was the Summary Judgment which later became the basis for Attorney's Fees of $23,274.33. Richard's can only base the relevant facts of the case

from memory of Law and Motion in the court of Judge Stephen Henroid on April 14, 2008.

Pursuant to *Utah R. of Appellate Procedure Rule* 54(a), Sufficiency of Evidence Supporting Findings or Conclusion; where an appellant intends to challenge the sufficiency of the evidence supporting finding of conclusion, "the appellant must include in the record of the transcript, of all evidence relevant to the challenged finding or conclusion", as in the cases of *Child vs. Child,* **UT Sup. Ct. No. 20081044, March 17, 2009,** and *J.G. vs. State of Utah,* **2008 UT App 439.**

POINT III
APPELLEE'S RESPONSE WAS INADEQUATELY BREIFED.

Appellee's filed a brief where over eighty percent of their case law did not support their arguments. Appellee's cited over fifty percent of their cases which represented criminal procedure instead of civil procedure and did not represent to the court their representation on criminal law and how it applies to this civil case. Pursuant to *Utah R. Appellate Procedure. Rule* 24(a)(9), "Supreme Court is not a depository in which appealing [parties] may dump burden of argument and research, *State v. Brown* **853 P.2d 851, (Utah 1993),** (an applicable criminal case for this civil argument)."[Emphasis added]. This is outside the scope of civil law unless properly addressed to the court that criminal law does apply in this case. In addition to this error, the Appellee's Appendix was inadequately cited throughout their brief by only citing page numbers where many Exhibits within their Appendix contained the same page numbers. Pursuant to *Cloyd v. Cloyd* **2009 UT App 123, (May 7, 2009),** "To be properly briefed, an argument must provide reasoned analysis based on legal authority cited," *Spencer v. Pleasant View City* **2003 UT App 379,** para. **20, 80 P.3d 546,** *Wall v. Wall* **2009**

UT App 129, (May 14, 2009), therefore, all arguments that have been cited in Appellee's brief should be disregarded. Attached hereto as Exhibit B, Appellee's cases which were not applicable to their arguments or cited pursuant civil procedure.

POINT IV
APPLLANT CANNOT PROPERLY ARGUE PROCEEDINGS.

Counsel for Appellant is unable to argue issues presented in front of Judge Henroid's Court since Counsel was hired on Appeal and was not present at the proceedings in District Court hearings. In addition, counsel for the Appellant cannot properly argue the issues that Appellee's present in their Response because their was no transcript available to present any arguments which could only be presented as heresay by Appellant's counsel and Richard's.

Richard's has only a transcript of the proceedings of the Order signed on 23 October 2008 by Judge Christiansen which were set for decision on Attorney's Fees. This transcript is not a supporting document, since is it based on a judgment and support for attorney fees in Judge Henroid Court which Richard's is unable to support his facts and findings without a transcript.

Richards went though the proper appellate procedures in ordering transcripts to back his appeal, to no avail, found through the Court Recorders Office there was no audio or video of the proceedings which supported a $76,930.91 judgment against him.

Based on only hearsay by both parties, and having no audio or video record from the Court to present a proper appeal for Richard's case, the Court of Appeals should remand this case back for a new trial pursuant to *Utah R. Civil Procedure Rule* 4-201, Record of Proceedings or pursuant to *State v.Ruiz* **2009 UT App 121, (May 7, 2009),** *Utah R. App P.* **35(c)** the court also

has the right to make a final disposition of the cause without reargument. (citing a criminal case, applicable to this civil case).

Appellant's counsel was not present to either hearings so Appellee's argument for attorney fees is irrelevant pursuant to *Jensen v. Jensen* **2009 UT App 1, (January 2, 2009),** "Attorney fees without entering findings on all of the necessary factors... has the right to be remanded for reconsideration of adequate findings on the award of attorney fees." Awarding attorney fees in Richard's case in not applicable without the proper facts and findings of the which have not been brought forward on appeal because there is no transcript to support the issues.

POINT V
IMPROPER JURISTICTION AND VENUE.

Appellee's failed to argue this issue which Appellant brought up in their original brief with no supporting case law. The trial court failed to consider Juristion and Venue by not adhering to designated rules of procedure with Appellee being a Nevada based corporation and intertwined a lawsuit in California, therefore not domesticating it in Utah.

In Judge Christiansen's Order against the Appellant there was no recognition of a foreign judgment, which was not properly registered and domesticated in the State of Utah from a California Court. Pursuant to *Gardiner vs. York*, **2006 UT App 496, Case No. 20051162-CA** Gardiner domesticated the case in Utah and then went after York alleging that the transfer of the warehouse was fraudulent, just as in this case, since the Appellee's did not prevail to the point of satisfaction in California, they went after the Appellant in a fraudulent manner. Appellee's owed Richard's $55,000.00, and therefore tried to receive what was owed Richard's to go in their

favor since they could not get a satisfactory judgment in California.

POINT VI
APPELANT WAS NOT A PROFESSIONAL *PRO SE* LITIGANT.

Appellee's improperly cited the case of *Nelson v. Jacobsen* **669 P.2d 1207, 1213 (Utah 1983)**, which is actually in favor and in support of Appellant, "A Layman is entitled to undertake his own representation, but due to his lack of technical knowledge of law and procedure, he should be accorded every consideration...of a layman's decision to function in a capacity for which he was not trained..." Not only does this case apply to Appellant and not Appellee's, Appellant 's case of *Lundahl v Quinn*, **2003 UT 11/4, 67 P.3d 1000,** sets precedence over **id.**

Richard's is a *pro se* litigant and should have some leniency *Lundahl v Quinn*, **2003 UT 11/4, 67 P.3d 1000,** whereby leniency should be granted when a *pro se* litigant is required or forced into representing himself in a Court of Law. Richard's filed to protect his interest and objected to the proceeding and protected his right to appeal these decisions. If Richard's would have been afforded Due Process this case would not be presented on appeal today.

POINT VII
APPELANT'S CASES STATE PRECEDENCE OVER APPELLEE'S.

Appellee's cases should be stricken, not only for not supporting the issues raised on appeal, but for old case law that is not relevant to this case. Appellant's case law set's precedence to the case law presented by the Appellee's.

CONCLUSION

This case needs to be vacated or just supported by Appellant's brief based on the inadequately briefed response by Appellee's, and based on the fact that this is a foreign judgment which has not been domesticated in Utah which does not follow the *Utah R.of Civil Procedure* regarding proper jurisdiction and venue of these civil proceedings.. In the alternative this case should be reversed and remanded, back for new trial based upon no transcript available to support Richard's appeal for evidence supporting findings, facts, and conclusion of law.

Dated this 26th day of May 2009.

Respectfully Submitted,

Wayne R.N. Searle
Attorney for Appellant
Counsel for the Appellant

I certify that on this 26th day of May 2009, I personally placed a true and correct copy of the "Appellant's Reply Brief", in a sealed envelope. I further placed the same in the United States Postal Service and addressed it to the following:

Ronald S. George
Law Offices of Ronald S. George P.A.
218 W Paxton Ave.
Salt Lake City, Utah 84101

Delano S. Findlay
Attorney at Law
648 East Vine Street, Suite #3
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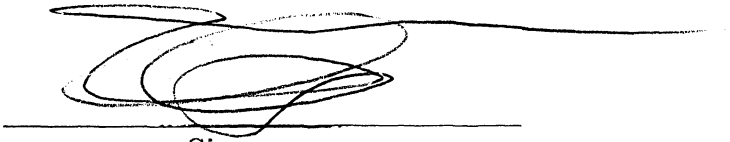

Signature

ADDENDUM

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Exhibit A-Order from Appellate Court

Exhibit B-Appellee's Non-Applicable Case Law

Exhibit C-Appellant's Cited Case Law

EXHIBIT A

IN THE UTAH COURT OF APPEALS

----ooOoo----

Resource Technics, LLC; Resource Concepts, LLC; Ronald S. George; Lynn P. Heward; N. Enos Heward; and Interphase Corp.,

Plaintiff and Appellees,

v.

Gene M. Richards,

Respondent and Appellant.

ORDER

Appellate Case No. 20080910-CA

Before Judges Bench, Davis, and McHugh.

Appellee failed to submit the electronic courtesy brief required under Utah Supreme Court Standing Order No. 8 within fourteen days after the filing of the printed brief. Please be advised that within seven (7) days from the date of this order, you must submit to the court, a copy of appellee's brief on compact disc in searchable PDF format or a motion stating good cause to be excused from complying with Utah Supreme Court Standing Order No. 8. The courtesy brief must be accompanied by a certificate of service.

Dated this 13th day of May, 2009.

FOR THE COURT:

James Z. Davis, Judge

EXHIBIT B

APPELLEE'S CASE LAW NOT APPLICABLE TO ARGUMENTS PRESENTED IN RESPONSE BRIEF.

Armstrong v. Department of Employment Security, 834 P.2d 562 (Utah Ct. App. 1992)

Hart v. Salt lake County Comm'n, 945 P.2d 125, 130 (Utah Ct. App 1998)

Rohan v. Boseman, 46 P.3d 753, 2002 UT App 109 (Utah App. 2002)

State v. Brown, 853 P.2d 851, 854 n. 1 (Utah 1992)

State v. Gamblin, 2000 UT 44, 1 P.3d 1108

State v. Pena, 869 P.2d 932, 935-36 (Utah 1994)

State v. Thomas, 961 P.2d 299, 305 (Utah 1998)

Treff v. Hinkley, 2001 UT 50, 26 P.3d 212

Von Hake v. Thomas, 759 P.2d 1162, 1169 n. 6 (Utah 1988)

ALL OTHER CASE LAW PRESENTED IN APPELLEE'S RESPONSE BRIEF IS NOT APPLICABLE BECAUSE APPELLANT'S CASE LAW SET'S PRECEEDENCE OVER THE OLD CASE LAW PRESENTED ON APPEAL IN APPELLEE'S BRIEF, WITH THE EXCEPTION OF:

Lundahl v. Quinn, 67 P.3d 1000, 2003 UT 11 (Utah 1998) (Utah 2003)

EXHIBIT C

2009 UT 17

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

Cathy Child,
Petitioner,

v.

David N. Child,
Respondent.

No. 20081044

F I L E D

March 17, 2009

Seventh District, Price Dep't
The Honorable Bruce K. Halliday
No. 024700194

Attorneys: Rodney R. Parker, Salt Lake City, for petitioner
Joane Pappas White, Price, for respondent

On Certiorari to the Utah Court of Appeals

PER CURIAM:

¶1 This matter is before the court upon a Petition for Writ of Certiorari, filed on December 22, 2008.

¶2 The petition is granted only as to the following question:

> Whether the court of appeals erred in awarding Respondent "the full value of his 25% share in the [family rental] business" without remanding for an opportunity to make findings to support the district court's decision.

¶3 As to the limited issue described by this question, we summarily reverse and remand. The court of appeals stated a sufficient basis for reversal of the district court's decision for a lack of findings, but it did not adequately support the additional step of declaring that the identified exceptions to the general rule excluding premarital property from the marital estate had not been established. It appears the latter conclusion could only be predicated on a distinct appellate determination that (1) the arguments or evidence presented to the

district court were, as a matter of law, insufficient to invoke or establish one of the exceptions, or (2) the district court acted within its discretion in declining to make findings because it properly deemed the arguments or evidence insufficient to justify distinct findings as to an exception. If, on remand, the court of appeals is unable to make such an additional determination to support the result it reached, the matter should be remanded to the district court to provide findings to justify or correct the result that court originally reached. Accordingly, we remand to the court of appeals to take the action it deems appropriate according to the directives described in this order.

IN THE UTAH COURT OF APPEALS

----ooOoo----

Dalene S. Cloyd, Petitioner and Appellee, v. Timothy A. Cloyd Sr., Respondent and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080357-CA F I L E D (May 7, 2009) 2009 UT App 123

Second District, Morgan Department, 974500042
The Honorable Michael G. Allphin

Attorneys: Timothy A. Cloyd Sr., Clearfield, Appellant Pro Se
Brad C. Smith, Ogden, for Appellee

Before Judges Thorne, Bench, and Orme.

PER CURIAM:

Timothy A. Cloyd Sr. appeals from the trial court's orders entered March 19, 2008. We affirm.

Briefing standards are provided in rule 24 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 24. An appellate brief must contain, among other things, a statement of the issues for review, including the standard of review for each issue and a record citation showing that each issue was preserved for appeal. See id. R. 24(a)(5). In addition, a statement of facts relevant to the issues on appeal must be provided along with citations to the record to support the facts asserted. See id. R. 24(a)(7). A brief must also contain argument specifically setting forth the contentions and reasons of an appellant regarding the issues presented and including citations to relevant legal authority. See id. R. 24(a)(9). A party challenging a finding of fact must marshal the evidence in support of that finding. See id. To be properly briefed, an argument must provide reasoned analysis based on the legal authority cited. See Spencer v. Pleasant View City, 2003 UT App 379, ¶ 20, 80 P.3d 546.

Mr. Cloyd's briefing fails in all these respects. His opening brief is incomprehensible and apparently unrelated to his actual case. The stated issues challenge alimony and marital

property distribution, which issues were resolved by stipulation in 2001. There is no fact section and no citations to the record. There is no attempt to make any relevant point tied to the facts of this case. His reply brief fares no better. It contains allegations unsupported by the record, maligns the trial court, goes beyond the scope of a reply brief, and fails to present any reasoned argument. It is well established that appellate courts will not address issues inadequately briefed. See MacKay v. Hardy, 973 P.2d 941, 948 (Utah 1998). Accordingly, the trial court's orders are affirmed.

Dalene Cloyd requests that sanctions be imposed under rule 33 of the Utah Rules of Appellate Procedure because Mr. Cloyd's appeal is frivolous. See Utah R. App. P. 33. Although we decline to award sanctions, costs are awarded pursuant to rule 34 of the Utah Rules of Appellate Procedure. See id. R. 34. Additionally, because Ms. Cloyd was awarded attorney fees below, she is entitled to them on appeal. See Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998).

The trial court's orders are affirmed and this matter is remanded for a determination of costs and reasonable attorney fees.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge

IN THE UTAH COURT OF APPEALS

----ooOoo----

Richard Gardiner, Plaintiff and Appellant, v. Betty York and Interport, Inc., Defendants and Appellee.	OPINION (For Official Publication) Case No. 20051162-CA F I L E D (December 14, 2006) 2006 UT App 496

Fourth District, Fillmore Department, 016700050
The Honorable Donald J. Eyre Jr.

Attorneys: James K. Slavens, Fillmore, for Appellant
A. Samuel Primavera, Riverton, for Appellee

Before Judges Billings, McHugh, and Thorne.

McHUGH, Judge:

¶1 Richard Gardiner appeals from the trial court's order denying his motion for attorney fees. In this case, we examine whether attorney fees incurred in pursuing a fraudulent transfer action are recoverable as consequential damages stemming from a prior breach of contract. Because we hold that the trial court failed to engage in the appropriate analysis of this issue, we remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Gardiner obtained a judgment of $7182, plus interest and costs, against Interport, Inc. (Interport) for breach of contract. The breach of contract suit was tried and decided in Virginia. Gardiner then domesticated the judgment in Utah.

¶3 While the Virginia action was underway, Interport's president, William York Jr., transferred Interport's only asset, a warehouse in Delta, Utah, to his parents, William York Sr. and Betty York. After the judgment was domesticated, Gardiner filed

a petition for relief in Utah against Interport and Betty York,[1] alleging that the transfer of the warehouse was fraudulent. Gardiner sought either a judgment lien or avoidance of the transfer. See Utah Code Ann. § 25-6-8 (1998) (setting forth the remedies of creditors who seek relief from debtors' fraudulent transfer of assets). The trial court entered a default judgment against Interport after it failed to defend. A bench trial was held with Betty York as the remaining defendant. The trial court found that Interport had transferred the warehouse with the intent to defraud Gardiner and authorized a judgment lien against the property.[2]

¶4 Gardiner then filed a motion to recover the attorney fees he incurred in pursuing the fraudulent transfer litigation. The trial court denied the motion. When the trial court denied Gardiner's motion to reconsider the attorney fee ruling, he appealed.

ISSUE AND STANDARD OF REVIEW

¶5 The sole issue on appeal is whether the trial court erred in denying Gardiner's request for attorney fees. Whether attorney fees should be awarded is a legal issue that we review for correctness. See Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998).

ANALYSIS

I. The Trial Court's Decision

¶6 Gardiner requested an award of attorney fees at the conclusion of trial. The trial court denied the motion, reasoning that there was "no basis[,] either statutory or contractual[,] why the fees should be awarded." Gardiner then filed a motion to reconsider,[3] clarifying that his argument for

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1. William York Sr. passed away during this time and was not a party to the fraudulent transfer action.

2. Betty York appealed the trial court's ruling that the transfer was fraudulent. We affirmed the trial court's decision in Gardiner v. York, 2006 UT App 433 (mem.) (per curiam).

3. Although postjudgment motions to reconsider are no longer valid, see Gillett v. Price, 2006 UT 24,¶¶7-8, 135 P.3d 861, we consider the denial of the motion to reconsider here because the (continued...)

attorney fees was based on the "third-party litigation exception" to the general rule that attorney fees are only recoverable when authorized by statute or contract. In his memorandum in support of his motion to reconsider, Gardiner cited Macris & Associates v. Neways, Inc., 2002 UT App 406, 60 P.3d 1176, and Collier v. Heinz, 827 P.2d 982 (Utah Ct. App. 1992), for the principle that attorney fees may be recoverable as consequential damages in the limited situation where the defendant's breach of contract[4] foreseeably caused the plaintiff to incur attorney fees in litigation with a third party. See Macris, 2002 UT App 406 at ¶¶13-14; Collier, 827 P.2d at 983-84. The trial court, however, again denied attorney fees, this time stating that

> [Gardiner] . . . cites the [c]ourt to the case of [Collier] for the proposition that there is a "third party exception" to the general rule that a court should not award attorney[] fees unless there is a statutory or contractual basis to do so. The [c]ourt finds the Collier decision to be limited only to the situation where an insurer breaks its contract with an insured, which is not the situation in the present case.

Although the trial court correctly noted that Collier identified a right to attorney fees that is unique to the insurance context, it confused that rule with the more general third-party litigation exception. See 827 P.2d at 984. "Under the third-party attorney fee[] exception, only the fees incurred in litigation with the third party are recoverable as consequential damages." Id. at 983-84. Attorney fees may not be awarded under the third-party litigation exception when the litigation for which fees are sought is between the contracting parties. See id. at 984.

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3. (...continued)
motion was made before Gillett was issued, see Radakovich v. Cornaby, 2006 UT App 454,¶7 & n.4 (noting Gillett was to be applied prospectively).

4. Although this opinion refers to the third-party litigation exception only in the context of contract law, the exception also applies in tort law. See South Sanpitch Co. v. Pack, 765 P.2d 1279, 1282 (Utah Ct. App. 1988) ("[W]hen the natural consequence of one's negligence is another's involvement in a dispute with a third party, attorney fees reasonably incurred in resolving the dispute are recoverable from the negligent party as an element of damages.").

¶7 The Collier court, however, noted that the Utah Supreme Court in Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989), carved out a separate exception in circumstances where an insurer breached a contract with an insured. See 827 P.2d at 984-85. In such direct actions between an insured and his insurer, attorney fees incurred in that action can be recovered. See Bracey, 781 P.2d at 420; Collier, 827 P.2d at 984. The insurance case rule, however, is distinct from the exception that allows the recovery of fees incurred in third-party litigation if the fees are consequential damages of the breach. The Collier court explained: "The award of attorney fees as consequential damages, outside the context of statutory and contractual authorization, should be limited to . . . two situations . . . : insurance contracts and the third-party exception." 827 P.2d at 984 (emphasis added); cf. Pugh v. North Am. Warranty Servs., Inc., 2000 UT App 121,¶21 & n.7, 1 P.3d 570 (awarding attorney fees in a breach of insurance contract case but noting that the insurance contract exception should not be expanded beyond "the realm of contracts fairly characterized as insurance contracts").

¶8 The Collier court ultimately concluded that an award of attorney fees was inappropriate in that case because neither the third-party litigation exception nor the insurance contract exception applied. See 827 P.2d at 985. There, the attorney fees were incurred in a direct action between the contracting parties and the contract at issue was a settlement agreement rather than an insurance contract. See id. at 984-85. Here, the trial court's decision on Gardiner's motion to reconsider focused solely on the insurance case exception, despite the fact that the third-party litigation exception and the insurance contract exception are separate and distinct concepts. In this case, Gardiner and Interport were the contracting parties, and Gardiner sued a third party, Betty York, in the fraudulent transfer litigation.[5] Thus, although the trial court correctly rejected the insurance exception, it erred in failing to analyze whether the third-party litigation exception warranted an award of attorney fees.

II. The Third-Party Litigation Exception as Applied to This Case

¶9 On appeal, Gardiner argues that he is entitled to an award of attorney fees because Interport's actions caused him to incur those fees in obtaining a judgment lien against the warehouse.

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5. As noted, Interport was originally a defendant in the fraudulent transfer action, but after Interport failed to defend, the trial court entered a default judgment against Interport and the case went to trial against Betty York only.

In his brief, Gardiner argues primarily that Interport's fraudulent transfer was the wrongful act that caused him to engage in litigation with Betty York.[6] We reiterate that the third-party litigation exception "allows recovery of attorney fees as consequential damages, but only in the limited situation where the defendant's breach of contract foreseeably caused the plaintiff to incur attorney fees through litigation with a third party." Collier, 827 P.2d at 983 (emphasis added); see also Lewiston State Bank v. Greenline Equip., L.L.C., 2006 UT App 446,¶21 (noting that the Utah Supreme Court "has allowed an award of attorney fees as consequential damages arising from a breach of contract, but only in limited contexts"). Therefore, attorney fees are recoverable under this exception only if they are caused by and are a foreseeable result of the original breach of contract, not a subsequent wrongful act.

¶10 In Macris & Associates v. Neways, Inc., 2002 UT App 406, 60 P.3d 1176, this court considered the third-party litigation exception under circumstances similar to those at issue here. Plaintiff Macris originally filed suit for breach of contract against Images and Attitude, Inc. See id. at ¶2. Images subsequently sold its assets to Neways. See id. at ¶4. While the breach of contract action was pending, Macris filed suit against Neways, claiming that the transfer of assets from Images to Neways was fraudulent and left Images with insufficient assets to satisfy any judgment that Images might be required to pay as a result of the breach of contract suit. See id. at ¶3. Macris prevailed in the breach of contract suit and Neways International, Inc., a company separate from Neways, paid the judgment. See id. at ¶7. Neways then filed a motion for summary judgment in the fraudulent transfer suit, arguing that the suit was rendered moot by Neways International's payment of the judgment. See id. at ¶8. In response, Macris asserted that it was entitled to recover the attorney fees incurred in the fraudulent transfer action. See id. The trial court granted the motion for summary judgment, holding that attorney fees were not recoverable because the action arose under the Utah Uniform Fraudulent Transfer Act (UFTA), which did not contain an express provision authorizing an award of attorney fees. See id. at ¶9.

---

6. Gardiner asserts that "[the] fraudulent transfer necessitated the litigation against Betty York to void the transfer of, or to have a judgment lien on, the warehouse." At another point in his brief, Gardiner contends that "it was foreseeable that Interport's breach of contract and fraudulent conveyance to a third party would compel Gardiner to pursue action, thus incurring attorney[] fees, against Betty York in order to collect on his Virginia judgment."

¶11 This court reversed, reasoning that the UFTA was a codification of the common law and should be liberally construed. See id. at ¶16 ("'[U]nless displaced by [the UFTA], the principles of law and equity, including merchant law and the law relating to principal and agent, equitable subordination, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement [the UFTA's] provisions.'" (quoting Utah Code Ann. § 25-6-11 (1998)). Thus, this court in Macris held that "the third-party litigation exception is retained from common law and may be applied to causes of action that arise under [the] UFTA." Id. at ¶17.

¶12 Despite this court's holding that the failure of the UFTA to include an attorney fees provision did not necessarily bar an award of attorney fees under the third-party litigation exception, we nonetheless held that Macris had to demonstrate that the fraudulent transfer action was a natural consequence of Images's original breach of contract. See id. at ¶22. "[E]ven though Macris [was] entitled to seek attorney fees incurred in pursuing a UFTA claim using the third-party litigation exception, it [was] limited by the requirements of the exception." Id. at ¶18. Where the third-party litigation exception is at issue, and the cause of action for which attorney fees are sought arises under the UFTA, a party is not foreclosed from obtaining attorney fees merely because the UFTA contains no fee provision. However, to recover under the third-party litigation exception, the movant must show that the original breach of contract foreseeably caused it to incur attorney fees as consequential damages in the subsequent UFTA litigation with the third party. Cf. Collier v. Heinz, 827 P.2d 982, 983 (Utah 1992).

¶13 Gardiner, therefore, has the burden of demonstrating that it was foreseeable that Interport's breach of contract would subject him to attorney fees in the fraudulent transfer action against Betty York. Whether expenses are foreseeable and therefore recoverable as consequential damages flowing from a breach of contract is a question of fact appropriately resolved by the trial court. See Moore v. Energy Mut. Ins. Co., 814 P.2d 1141, 1148 (Utah Ct. App. 1991). We therefore remand to the trial court for a determination of whether Gardiner's fees were a foreseeable result of Interport's breach of contract. However, "a brief discussion of [consequential damages and foreseeability] is appropriate as guidance for the trial court on remand." Armed Forces Ins. Exch. v. Harrison, 2003 UT 14,¶38, 70 P.3d 35. "[T]o provide guidance to the trial court on remand[,] . . . we simply set forth the applicable law." Id. at ¶41 (alterations and omission in original) (quotations and citation omitted).

¶14 Consequential damages are "those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made."[7] Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985); see also Mahmood v. Ross, 1999 UT 104,¶30, 990 P.2d 933 ("To prove consequential damages, a claimant must not only show a causal link between the breach and the subsequent injury, but he must also show that the injury was reasonably foreseeable or reasonably contemplated by the parties at the time the contract was entered into.").

¶15 In Pacific Coast Title Insurance Co. v. Hartford Accident & Indemnity Co., 7 Utah 2d 377, 325 P.2d 906 (1958), the Utah Supreme Court discussed foreseeability in analyzing the precise question in this case--whether attorney fees expended in an action against a third party were recoverable as consequential damages of an original breach. In Pacific Coast, the contractor failed to pay its subcontractors, laborers, and materialmen. See id. at 907. As a result, they filed liens against the homes under construction. See id. Plaintiff Pacific Coast, which was responsible for keeping title to the properties unencumbered, defended against the foreclosure of the liens. After settling with the subcontractors, Pacific Coast filed suit against the contractor's performance bond to recover the attorney fees and costs incurred. See id. The supreme court acknowledged that generally attorney fees are not recoverable absent statutory or contractual authorization, but nonetheless awarded them to Pacific Coast as consequential damages. See id. The supreme court set forth principles of foreseeability, stating that

> to be compensable, the loss must result from the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of the parties had averted to breach when the contract was made, loss of such character would have been within their contemplation.

Id. The court then reasoned that the award of attorney fees to Pacific Coast was appropriate because it was foreseeable that the contractor's failure to pay the workers "would bring about the series of events" that occurred, including the filing of liens and Pacific Coast's retention of attorneys to defend against foreclosure. Id. at 908; see also Fleck v. National Prop. Mgmt., Inc., 590 P.2d 1254, 1255 (Utah 1979) (refusing to award consequential damages because it was not foreseeable that

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7. By contrast, "general damages" are "those flowing naturally from the breach." Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985).

defendant's failure to improve subdivision lots would bring about loss of plaintiffs' down payment on lots, since plaintiffs lost title to lots through foreclosure of preexisting trust deeds).

¶16 With these principles in mind, the trial court must determine whether it was reasonably foreseeable, at the time that Gardiner and Interport contracted, that Interport's breach of contract would cause Gardiner to incur attorney fees in the fraudulent transfer action against Betty York. If the trial court concludes that the attorney fees were foreseeable and that they resulted from Interport's breach, then the fees are awardable as consequential damages under the third-party litigation exception. If, however, the likelihood of an action under the UFTA in the event of breach was not within the contemplation of the parties at the time of contracting, or there was no causal link between the fees and the breach, no award of attorney fees is appropriate under the third-party litigation exception. See Collier v. Heinz, 827 P.2d 982, 983 (Utah Ct. App. 1992); Moore, 814 P.2d at 1147-48.

CONCLUSION

¶17 Although the trial court correctly concluded that the insurance case exception was unavailable to support an award of attorney fees, it erred by failing to analyze whether Gardiner's fees are recoverable under the third-party litigation exception. We remand to the trial court for a determination of whether the attorney fees Gardiner incurred in pursuing the fraudulent transfer action were a reasonably foreseeable consequence of Interport's breach.

¶18 Reversed and remanded.

Carolyn B. McHugh, Judge

¶19 WE CONCUR:

Judith M. Billings, Judge

William A. Thorne Jr., Judge

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, in the interest of B.C.G., a person under eighteen years of age. J.G., Appellant, v. State of Utah, Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080607-CA F I L E D (December 4, 2008) 2008 UT App 439

Third District Juvenile, Salt Lake Department, 500851
The Honorable C. Dane Nolan

Attorneys: Candice Ragsdale-Pollock, Salt Lake City, for Appellant
Mark Shurtleff and John M. Peterson, Salt Lake City, for Appellee
Martha Pierce and Amy Mitchell, Salt Lake City, Guardians Ad Litem

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Before Judges Greenwood, Thorne, and Orme.

PER CURIAM:

J.G. (Father) appeals the termination of his parental rights in B.C.G. In his petition on appeal, Father asserts there was insufficient evidence to support the termination. However, he has failed to provide this court with an adequate record to review his claim, and thus, the trial court's order must be affirmed.

Pursuant to rule 54(a) of the Utah Rules of Appellate Procedure, where an appellant intends to challenge the sufficiency of the evidence supporting a finding or conclusion, "the appellant must include in the record a transcript of all evidence relevant to" the challenged finding or conclusion. Utah R. App. P. 54(a). Father has failed to provide the transcript of his termination trial, in contravention of rule 54. In the

absence of an adequate record on appeal, we cannot reach the issues raised and must presume the correctness of the disposition. See State v. Miller, 718 P.2d 403, 405 (Utah 1996) (per curiam).

Accordingly, the termination of Father's parental rights is affirmed.

Pamela T. Greenwood,
Presiding Judge

William A. Thorne Jr.,
Associate Presiding Judge

Gregory K. Orme, Judge

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Court of Appeals of Utah.
Kae JENSEN, Petitioner and Appellee,
v.
David Leon JENSEN, Respondent and Appellant.
No. 20061164-CA.

Jan. 2, 2009.

Background: Husband appealed from decision of the Sixth District Court, Richfield Department, David L. Mower, J., awarding wife one-half of the increase in equity of closely held corporation, which employed husband, and awarding wife attorney fees.

Holdings: The Court of Appeals, Greenwood, P.J., held that:
(1) because husband did not own all of closely held corporation, corporation's total increase in equity was not available for distribution as a marital asset; and
(2) wife was not entitled to one-half of the increased equity in closely held corporation, which employed husband.

Reversed and remanded.

Orme, J., concurred specially and filed opinion.

West Headnotes

[1] Divorce 134 ⚿252.1

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.1 k. Discretion of Court. Most Cited Cases

Divorce 134 ⚿286(2)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(2) k. Presumptions. Most Cited Cases
Trial court has considerable discretion concerning property division in a divorce proceeding and, thus, its actions enjoy a presumption of validity.

[2] Divorce 134 ⚿286(1)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(1) k. Scope and Extent in General. Most Cited Cases

Divorce 134 ⚿286(5)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(3) Discretion of Lower Court
134k286(5) k. Disposition of Property. Most Cited Cases

Divorce 134 ⚿286(8)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(6) Questions of Fact, Verdicts and Findings
134k286(8) k. Disposition of Property. Most Cited Cases
Appellate court will not disturb a property award in divorce action unless appellate court determines that there has been a misunderstanding or misap-

plication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.

[3] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases
Appellate courts review the legal adequacy of findings of fact for correctness as a question of law.

[4] Divorce 134 ⚿286(4)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(3) Discretion of Lower Court
134k286(4) k. Temporary Alimony, Counsel Fees and Expenses. Most Cited Cases
Appellate courts review a trial court's attorney fee award in divorce proceedings for abuse of discretion.

[5] Divorce 134 ⚿226

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k220 Allowance for Counsel Fees and Expenses
134k226 k. Application and Proceedings Thereon. Most Cited Cases

Divorce 134 ⚿287

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k287 k. Determination and Disposition of Questions. Most Cited Cases
To demonstrate that the trial court has acted within its allotted discretion, the trial court must base the attorney fee award in divorce action on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees; the failure to make such findings requires remand for more detailed findings by the trial court.

[6] Appeal and Error 30 ⚿846(6)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k846 Trial by Court in General
30k846(6) k. Consideration and Effect of Findings or Failure to Make Findings. Most Cited Cases

Trial 388 ⚿395(5)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k395 Sufficiency in General
388k395(5) k. Ultimate or Evidentiary Facts. Most Cited Cases
To withstand appellate review, trial court's findings of fact must show that the court's judgment or decree follows logically from, and is supported by, the evidence, and the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.

[7] Divorce 134 ⚿253(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k253 Proceedings for Division or Assignment
134k253(4) k. Verdict or Findings. Most Cited Cases

Divorce 134 ⚿286(9)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(9) k. Harmless Error. Most Cited Cases
In dividing property in divorce cases, trial court must identify the property in dispute and determine whether each item is marital or separate property, and failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.

[8] Divorce 134 ⚿252.2

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.2 k. Proportion or Share Given on Division. Most Cited Cases
For marital assets to be distributed, the assets must be in the possession of one, or both, of the marital parties.

[9] Divorce 134 ⚿252.3(1)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(1) k. In General. Most Cited Cases
Because husband did not own all of closely held corporation, corporation's total increase in equity was not available for distribution as a marital asset.

[10] Divorce 134 ⚿252.3(3)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) k. Separate Property and Property Acquired Before Marriage. Most Cited Cases
Wife was not entitled to one-half of the increased equity in closely-held family corporation, of which husband was president and partial owner; wife did not assist in running the business nor contribute in any way to its increase in equity, and it was unclear whether the increase in equity was due to anything other than inflation.

[11] Divorce 134 ⚿226

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k220 Allowance for Counsel Fees and Expenses
134k226 k. Application and Proceedings Thereon. Most Cited Cases

Divorce 134 ⚿287

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k287 k. Determination and Disposition of Questions. Most Cited Cases
Trial court's attorney fee award to wife in divorce action could not stand because, while the court acknowledged that husband made more money than wife, court made no findings on husband's ability to

pay wife's attorney fees or on the reasonableness of the fees incurred, and thus, remand was necessary.
***1021** Douglas L. Neeley, Manti, for Appellant.

Craig G. Adamson, Craig A. Hoggan, and Joelle S. Kesler, Salt Lake City, for Appellee.

Before GREENWOOD, P.J., and BILLINGS [FN1] and ORME, JJ.

FN1. Judge Billings acted on this case prior to her retirement on Dec. 31, 2008.

OPINION

GREENWOOD, Presiding Judge:

¶ 1 David Leon Jensen (Husband) appeals from the trial court's Supplemental Findings of Fact and Conclusions of Law, arguing that the trial court erred by awarding Kae Jensen (Wife) one-half of the increase in equity of A & D Contractors, Inc. (A & D) and by awarding Wife attorney fees without entering findings on all of the necessary factors. We reverse the trial court's award of one-half of the increased equity in A & D to Wife and reverse and remand for reconsideration of and adequate findings on the award of attorney fees to Wife.

BACKGROUND

¶ 2 Husband and Wife were married for seventeen years and had one child together. They were divorced in July 2005, pursuant to a bifurcated decree and subsequently participated in a three-day trial addressing the division of property and debt.

¶ 3 At the close of trial, the court found that Husband was employed by A & D, a closely held corporation, throughout the parties' marriage. The trial court also found that Wife was the primary "homemaker and caretaker" of the parties' child. From 1991 forward, Wife worked part-time as a beautician and massage therapist. At the time of trial, Wife was operating a massage therapy and cosmetology business out of the parties' residence.

¶ 4 Regarding A & D, the trial court found that the corporation was organized in 1967 by Husband's father and uncles. Through a series of transactions, Husband became the owner of up to half of the corporation's issued shares. In addition, the trial court found that from at least 2001, A & D's corporate tax returns indicated that Husband and his brother, Mark, each owned fifty percent of the corporation; the two brothers "ha[d] been in charge of the [c]orporation since the death of their father"; Husband was listed on various stock certificates as owning fifty percent of A & D's stock; and Husband was the president of the corporation. The trial court also noted that Husband's mother testified that she owned A & D stock, but had assigned her interest in that stock to her two sons, and the assignment "would become a full transfer upon her death." The trial court also found that over the course of the ***1022** parties' marriage, A & D's equity increased by $230,851.

¶ 5 Based on these findings, the trial court awarded Husband all the stock he "owns in A & D ... because it is his separate property acquired by gift." [FN2] The court also ordered that the entire $230,851 increase in A & D's equity "should be divided between the parties. It is marital property because [Wife] has contributed to such increase by taking upon herself the household responsibilities and care of the child." The court also ordered Husband to pay Wife's attorney fees in the amount of $12,562.50. Husband appeals.

FN2. Actually, according to Husband's testimony, Husband acquired part of his stock by purchase funded by A & D despite Husband's written agreement to pay for the stock himself.

ISSUES & STANDARDS OF REVIEW

spouse to preserve or augment the asset," as compared to situations where there is a "lack of such efforts." 760 P.2d at 306.

¶ 15 In the case before us, the trial court found that Wife "was the primary homemaker and caretaker of [the parties' child]." Wife "has a beautician license and a massage therapist license" and "began working as [a] massage therapist in December of 1991." Wife "contributed to family finances by operating massage therapy and cosmetology businesses" in part of the parties' home. Based on these findings, the trial court concluded Wife should be awarded part of the increased equity in A & D, stating, "It is marital property because [Wife] has contributed to such increase by taking upon herself the household responsibilities and care of the child." The trial court then made several offsets to the respective awards of equity.

¶ 16 The court's findings regarding Wife's contributions to A & D's equity are inadequate to justify the award. They are vastly different in character and quantity than those found to justify an award in our recent case law. Wife did not assist in running the business nor contribute in any way to its increase in equity. Moreover, it is unclear whether the increase in equity was due to anything other than inflation. *See Burke v. Burke,* 733 P.2d 133, 135 (Utah 1987) (rejecting claim to appreciation of spouse's separate property, in part because the added value "came solely from the effects of inflation"). Wife behaved in a very normal and commendable manner by caring for the parties' child, maintaining the household, and running her own part-time business from their home. More is required, however, to justify an award of Husband's separate property.

¶ 17 We note that Wife did not seek an award of the equity in A & D based on *Mortensen's* second circumstance, requiring extraordinary situations. *See Mortensen,* 760 P.2d at 308. At trial, Wife argued that an award of an interest in A & D was justified either because the property had been commingled or because she had contributed sufficiently to its operation and success. In addition, the trial court made no findings that would justify the award on that basis. Thus, it differs from *Kunzler,* where the majority of this court held that the wife had adequately preserved the issue of an equitable award because of extraordinary situations and the facts were supportive of that theory. *See Kunzler,* 2008 UT App 263, ¶¶ 33, 37, 190 P.3d 497. Therefore, we reverse the trial court's award to Wife of one-half of the increased equity in A & D and remand for reconsideration of other aspects of the divorce decree that may need to be adjusted in light of our decision.

II. Attorney Fees

[11] ¶ 18 Husband also argues that the trial court abused its discretion by awarding attorney fees without analyzing certain necessary factors. As this court has recognized, when awarding attorney fees in divorce cases, the trial court is required to make explicit findings regarding "the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." *Stonehocker v. Stonehocker,* 2008 UT App 11, ¶ 49, 176 P.3d 476 (internal quotation marks omitted). While Wife admits that "the trial court did not make any explicit findings to support its award of attorney[ ] fee[s]," she argues that the court's findings on the aforementioned factors can be implied from the record. In this case, the court acknowledged that Husband makes more money than Wife, but it made no findings on Husband's ability to pay Wife's attorney fees or on the reasonableness of the fees incurred. Moreover, the record is not adequate to imply findings on the omitted factors. Consequently, we reverse the trial court's attorney fee award and remand for reconsideration and entry of sufficient findings of fact thereon.

CONCLUSION

¶ 19 The trial court's property award of equity in A & D is based on insufficient findings of fact regarding ownership of the corporation and appears to

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Supreme Court of Utah.
Holli LUNDAHL, Petitioner,
v.
The Honorable Anthony QUINN, Respondent.
N.A.R. INC., Mark T. Olson, Olson & Associates, P.C., Anthony Tidwell, D.D.S., and Olympus View Dental Center, Respondents and Real Parties in Interest.
No. 20030062.

April 1, 2003.
Rehearing Denied April 1, 2003.

Pro se litigant sought to intervene in underlying collections action. The District Court, Salt Lake County, Anthony B. Quinn, J., refused to address litigant's legal filings. Litigant petitioned for extraordinary writ. The Supreme Court held that: (1) when an individual avails herself of the judicial machinery as a matter of routine, special leniency on the basis of pro se status is manifestly inappropriate; (2) litigant would no longer be afforded reasonable indulgence; (3) litigant's petition was frivolous on its face; and (4) real parties in interest were entitled to attorney fees and double costs for defending action.

So ordered.

West Headnotes

[1] Attorney and Client 45 ⇐62

45 Attorney and Client
45II Retainer and Authority
45k62 k. Rights of Litigants to Act in Person or by Attorney. Most Cited Cases
Supreme Court is generally lenient with pro se litigants.

[2] Attorney and Client 45 ⇐62

45 Attorney and Client
45II Retainer and Authority
45k62 k. Rights of Litigants to Act in Person or by Attorney. Most Cited Cases
When an individual avails herself of the judicial machinery as a matter of routine, special leniency on the basis of pro se status is manifestly inappropriate, particularly when the filings in question are routinely frivolous and have been brought with the apparent purpose, or at least effect, of harassment, not only of opposing parties, but of the judicial machinery itself.

[3] Attorney and Client 45 ⇐62

45 Attorney and Client
45II Retainer and Authority
45k62 k. Rights of Litigants to Act in Person or by Attorney. Most Cited Cases
Pro se litigant who had history of filing numerous pro se actions would no longer be afforded reasonable indulgence, and thus, litigant would be charged with full knowledge and understanding of all relevant statutes, rules, and case law, where litigant had chosen to make legal self-representation a full-time hobby, if not a career.

[4] Attorney and Client 45 ⇐62

45 Attorney and Client
45II Retainer and Authority
45k62 k. Rights of Litigants to Act in Person or by Attorney. Most Cited Cases
Supreme Court deemed any argument by pro se litigant that attempted to distort legal authority for purpose of evading or circumventing proscription against unlicensed practice of law as not brought in good faith, for purposes of litigant's petition seeking extraordinary writ allowing her to intervene in underlying collections action, where litigant had been expressly informed in the past that she could not represent the legal interests of other persons and litigant cited statute prohibiting practicing law without a license in petition. U.C.A.1953, 78-9-101(3).

[5] Costs 102 ⚿2

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In General. Most Cited Cases

Pro se litigant's petition for extraordinary writ, requesting an order directing trial court to allow her to intervene as a matter of right in underlying collections action, failed to comply with requisite standard for asserting such a petition, and thus, petition was frivolous on its face; rule governing substitution of parties provided proper mechanism, if any, for litigant to obtain relief she requested, and litigant did not document basis in law for bringing such a petition nor did she even purport to argue in favor of a good faith extension or modification. Rules Civ.Proc., Rules 25(c), 65B(a).

[6] Parties 287 ⚿58

287 Parties
287IV New Parties and Change of Parties
287k57 Substitution
287k58 k. In General. Most Cited Cases

Courts cannot be compelled to recognize a substitution of parties at the whim of the movant. Rules Civ.Proc., Rule 25(c).

[7] Appeal and Error 30 ⚿428(2)

30 Appeal and Error
30VII Transfer of Cause
30VII(D) Writ of Error, Citation, or Notice
30k428 Filing Notice and Proof of Service
30k428(2) k. Time for Filing. Most Cited Cases

Where a timely motion for attorney fees is interposed, the time for filing a notice of appeal does not begin to run until a final order fixing the amount of those fees is entered.

[8] Parties 287 ⚿61

287 Parties
287IV New Parties and Change of Parties
287k57 Substitution
287k61 k. Application and Proceedings Thereon. Most Cited Cases

Provision in rule governing substitution of parties that the action "may be continued by or against the original party," unless the court grants a motion for substitution, preserves the court's inherent power to manage the case without undue disruption, confusion, or interference. Rules Civ.Proc., Rule 25(c).

[9] Parties 287 ⚿6(1)

287 Parties
287I Plaintiffs
287I(A) Persons Who May or Must Sue
287k6 Real Party in Interest
287k6(1) k. In General. Most Cited Cases

Pretrial Procedure 307A ⚿556.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)2 Grounds in General
307Ak556 Parties, Defects as to
307Ak556.1 k. In General. Most Cited Cases

Rule requiring actions to be brought in the name of a real party in interest and prohibiting dismissal of action on ground that it was not prosecuted in name of real party in interest until court had appropriately examined the issue was inapplicable to pro se litigant's request to intervene in underlying collections action as a matter of right for purposes of pursuing counterclaim, where there was no question that counterclaims were initially brought in name of a real party in interest and basis for dismissal of lawsuit had nothing to do with litigant's belated assertion that she should be allowed to intervene. Rules Civ.Proc., Rule 17(a).

[10] Costs 102 ⚿66

102 Costs
102I Nature, Grounds, and Extent of Right in

General
102k65 Increased Costs, and Double or Treble Costs
102k66 k. In General. Most Cited Cases

Costs 102 ⇐194.44

102 Costs
102VIII Attorney Fees
102k194.44 k. Bad Faith or Meritless Litigation. Most Cited Cases
Pro se litigant's frivolous petition for extraordinary relief, requesting an order directing trial court to allow her to intervene as a matter of right in underlying collections action, entitled real parties in interest to attorney fees and double costs for defending such petition. Rules App.Proc., Rule 33(c)(1); Rules Civ.Proc., Rule 65B(a).

[11] Costs 102 ⇐128

102 Costs
102VI Security for Costs; Proceedings in Forma Pauperis
102k127 Action or Defense in Forma Pauperis
102k128 k. Nature and Grounds of Right. Most Cited Cases
Ordinarily, where litigants cannot afford to pay a filing fee, that fee is waived so that poverty will not create a de facto barrier to access to the courts.
***1001** Holli Lundahl, petitioner pro se.

Brent M. Johnson, Salt Lake City, for Judge Quinn.

Ronald F. Price, Salt Lake City, for N.A.R., Mark Olson, Olson & Associates, Anthony Tidwell, Olympus View Dental Center.

PER CURIAM:

¶ 1 This matter comes before the court on petition for extraordinary writ. The petitioner, Holli Lundahl, asserts she has filed a motion to intervene and an amended counterclaim complaint on which the district court refused to rule because it deemed her a nonparty to the action. Judge Anthony Quinn filed a response, as did N.A.R. Inc., Mark T. Olson, Olson & Associates, P.C., Anthony Tidwell, D.D.S., and Olympus View Dental Center as real parties in interest. We deny the petition and further hold that it is frivolous.

¶ 2 As background to this court's order on this petition, a brief recitation of the history of petitioner's many appearances before this court is appropriate. Since 1999, Holli Lundahl [FN1] has submitted no fewer than twenty-seven filings, consisting of nineteen appeals, four petitions for extraordinary writ (including the instant petition), two petitions for writ of certiorari, and two petitions for interlocutory appeal. Of these, five appeals are presently pending before either this court or the court of appeals, [FN2] two decisions on appeal were summarily affirmed, one decision on appeal has been affirmed per curiam, four appeals were dismissed for lack of jurisdiction (including Holli's attempt to appeal a criminal case where the lower court had dismissed the charges against her), two appeals were dismissed as premature, one appeal was dismissed for an improper rule 54(b) certification, and one appeal was voluntarily dismissed. Three petitions for extraordinary writ, two petitions for writ of certiorari, and two petitions for interlocutory appeal have been denied.

FN1. Because this matter was originally brought as a counterclaim by Holli Lundahl's sister, Kelli Lundahl, we generally will refer to them by their first names to avoid confusion.

FN2. Four of the nineteen appeals noted above were consolidated into a single action, leaving sixteen separate appeals for disposition.

¶ 3 In *Nelson v. Jacobsen,* 669 P.2d 1207, 1213 (Utah 1983), this court held that "as a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar." Nevertheless, *Nelson*

also noted that " 'because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every***1002** consideration that may reasonably be indulged.' " *Id.* (bracketed language in original) (quoting *Heathman v. Hatch,* 13 Utah 2d 266, 268, 372 P.2d 990, 991 (1962)).

[1][2] ¶ 4 Accordingly, this court generally is lenient with pro se litigants. Individuals have a right to represent themselves without being compelled to seek professional assistance. Where they are largely strangers to the legal system, courts are understandably loath to sanction them for a procedural misstep here or there. Holli, however, is hardly a stranger to the legal system. Where most ordinary individuals find themselves in court on only a handful of occasions in their lives, Holli has managed to embroil herself in more litigation in just a few short years than one would think humanly possible. When an individual avails herself of the judicial machinery as a matter of routine, special leniency on the basis of pro se status is manifestly inappropriate.

[3] ¶ 5 This is particularly true where the filings in question are routinely frivolous and have been brought with the apparent purpose, or at least effect, of harassment, not only of opposing parties, but of the judicial machinery itself. When Holli is unsuccessful in obtaining the relief she seeks, she has not infrequently resorted to collateral attack on the judges who have adjudicated her cases. Indeed, a significant number of the direct appeals Holli has filed have been brought from district court denials of petitions for extraordinary relief naming judges as defendants. Therefore, notwithstanding the dictum in *Nelson* cautioning courts to be lenient with pro se litigants, we now make clear that the reasonable indulgence that has been afforded to Holli in the past is at an end. Where Holli has chosen to make legal self-representation a full-time hobby, if not a career, it is not too much to expect her to strictly abide by the rules governing the appearances of parties before this court. Therefore, she shall be charged with full knowledge and understanding of all relevant statutes rules, and case law.

¶ 6 We also note Holli has occasionally employed the right to self-representation in a questionable manner. In this petition, as well as in at least three other recent appellate filings, Holli has purportedly acquired another person's cause of action by assignment and then has professed to represent that cause of action in her own right.[FN3] The Utah State Bar Rules of Integration and Management do not "prohibit a person who is unlicensed as an attorney at law ... from personally representing that person's own interests in a cause to which the person is a party." Utah State Bar R. Integration and Management R. III(T). However, this exception to the prohibition on the unauthorized practice of law is limited to actions where "the person is a party in his or her own right and *not as an assignee.*"[FN4] *Id.* (emphasis added). In this petition, Holli concedes the original cause of action belonged solely to Kelli Lundahl. On pages five and six of her petition, Holli asserts Kelli's counsel abandoned her on the morning of a hearing to determine a motion for summary judgment. Holli then states that "Kelli was unable to obtain other counsel willing to sue an attorney. Accordingly, Kelli *assigned* her property damage claims to Holli Lundahl." (Emphasis added.) In other words, the expressed purpose of the assignment was to allow Holli to prosecute the action because Kelli could not obtain a licensed attorney.

> FN3. *Lundahl v. Alta View Hospital,* No. 20020749; *Lundahl v. Qwest Communications,* No. 20020748; *Lundahl v. IHC,* No. 20010336. The response to the instant petition also contains some very troubling allegations that Holli has appeared at hearings and misrepresented herself as Kelli acting pro se. Respondents have attached an affidavit stating a person other than Kelli has appeared at hearings and represented herself as Kelli. We note that this affidavit does not explicitly identify Holli

Lundahl as the person appearing; we also note some of the allegations are not supported by affidavit and are hearsay. We therefore make clear that they do not affect our decision today.

FN4. Subsection 78-9-101(3) of the Utah Code contains substantially the same provision. Initially scheduled to be repealed on May 1, 2003, the repeal date has been extended to May 3, 2004. *See* H.B. 349 S1, 2003 Gen. Sess. (Utah) (enacted).

[4] ¶ 7 We offer no ruling at this time regarding whether Holli has violated the proscription***1003** on the unauthorized practice of law. Nonetheless, it remains pertinent to our purposes here that she actually cited section 78-9-101 of the Utah Code in her petition and that she has been expressly informed in the past that she cannot represent the legal interests of other persons.[FN5] Consequently, we deem any argument that attempts to distort legal authority for the purpose of evading or circumventing the proscription against unlicensed practice as not brought in good faith.

FN5. *E.g., Lundahl v. Alta View Hospital,* No. 20020749 (letter from court dated October 23, 2002).

¶ 8Rule 33(b) of the Rules of Appellate Procedure provides: "[A] frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." With this standard in mind, we turn to the present petition. The underlying collections action was commenced against Kelli as a defendant. The plaintiffs eventually agreed to dismiss the action with prejudice, apparently due to settlement of the claim. However, the case continued forward because Kelli elected to pursue a counterclaim against the plaintiff and other parties. On November 25, 2002, the district court granted the counterclaim defendants' motion for summary judgment and directed counsel to prepare the order. According to Holli's petition, Kelli assigned her claims on December 4, 2002. Holli asserts she then moved to intervene[FN6] on December 6, followed by numerous motions and objections. The counterclaim defendants moved for attorney fees, and the district court scheduled a hearing on that matter. Apparently, an order relating to the November 25 ruling was filed on December 27, and the hearing on attorney fees was conducted on January 16, 2003. The transcript of the January 16, 2003, hearing before the district court indicates Kelli appeared and was represented by licensed legal counsel. It is not clear whether Holli was present at the hearing. The district court indicated it would award a fixed amount of attorney fees and directed the counterclaim defendants' counsel to prepare an order. The district court stated it would not address Holli's pleadings because she was not a party to the case. It also specifically stated it would not allow Holli to appear as a party unless she filed a motion for substitution pursuant to rule 25(c) of the Utah Rules of Civil Procedure. Holli then brought the instant petition, requesting an order directing the district court to allow her to intervene as a matter of right.

FN6. The respondents to the petition dispute whether this motion was actually filed. They assert Holli obtained a date-stamped copy without leaving a copy for the district court. While these allegations are also troubling, resolution of the conflicting allegations is not material to our decision here. For the limited purpose of reviewing this petition, we will assume the motion to intervene was in fact filed.

[5] ¶ 9 Based on the documentation provided by the petition,[FN7] it is not warranted by existing law. A petition for extraordinary writ may be brought only where "no other plain, speedy and adequate remedy is available." Utah R. Civ. P. 65B(a). While Holli acknowledges this standard, her petition manifestly fails to comply with it.

FN7. The bulk of the allegations of fact in Holli's petition are argumentative, conclus-

ory, or irrelevant. Because this court does not have access to the record, it must necessarily rely on those facts, and documents properly derived from that record and submitted as part of the petition to guide its determination of frivolousness.

[6][7][8] ¶ 10 Where a chose in action is purportedly conveyed after a legal action concerning it already has been filed by the original party in interest, the assignee may be required to obtain a substitution of parties according to the dictates of rule 25(c) of the Rules of Civil Procedure; specifically: "the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action." Utah R. Civ. P. 25(c). While rule 25(c) speaks in permissive rather than mandatory terms, it is clear courts cannot be compelled to recognize a substitution of parties at the whim of the movant. *See, e.g., Calder Bros. Co. v. Anderson,* 652 P.2d 922, 927 n. 6 (Utah 1982) (upholding denial of motion for substitution of real party in interest, where motion was filed subsequent to default judgment). ***1004** The provision that the action "may be continued by or against the original party," unless the court grants a motion for substitution, preserves the court's inherent power to manage the case without undue disruption, confusion, or interference.[FN8] *See Briggs v. Hess,* 122 Utah 559, 561, 252 P.2d 538, 539 (1953).

FN8. One of Holli's asserted justifications for seeking an extraordinary writ is her claim that the time for filing a notice of appeal began to run on December 27, 2002. The real parties in interest, on the other hand, assert that order was not a final judgment. Regardless, where a timely motion for attorney fees is interposed, the time for filing a notice of appeal does not begin to run until a final order fixing the amount of those fees is entered. *See Promax Dev. Corp. v. Raile,* 2000 UT 4, ¶ 15, 998 P.2d 254 ("[A] trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for purposes of appeal."); *see also Sittner v. Schriever,* 2000 UT 45, ¶ 19, 2 P.3d 442. In this case, the final order on the motion for attorney fees had not been filed at the time Holli submitted this petition, and, in any event, Holli's own failure to timely move for substitution does not create an emergency necessitating this court's intervention.

[9] ¶ 11 Holli instead improperly moved to intervene as a matter of right under rule 24(a).[FN9] Rule 24(a) grants a right to intervene, upon "timely application," where the applicant "claims an interest relating to the property or transaction which is the subject of the action." Holli, however, cannot claim an independent interest relating to either property or a transaction because the "transaction" at issue is the alleged conveyance of the chose in action itself. If courts were to countenance such subterfuges, it would confer an unconditional right to intervene on the entire universe of individuals or entities legally capable of accepting the assignment of a cause of action.

FN9. Holli additionally relies on rule 17(a) of the Rules of Civil Procedure. Rule 17(a) requires actions to be brought in the name of a real party in interest. It also prohibits dismissal of the action "on the ground that it is not prosecuted in the name of the real party in interest," until the court has appropriately examined the issue. This rule plainly is inapposite. There is no question the counterclaims initially were brought in the name of a real party in interest. Also, the basis for dismissal of the lawsuit had nothing to do with Holli's belated assertion that she should be allowed to intervene; indeed, the district court granted summary judgment before Holli received her purported assignment.

¶ 12 Consequently, the district court's justifiable re-

fusal to address a multitude of last-ditch, disruptive legal filings was well within its discretion and supported by Holli's failure to avail herself of the procedural rule designed to afford her the relief she claimed. Holli has documented no basis in law for bringing a petition for extraordinary writ. Nor does she even purport to argue in favor of a good faith extension or modification. Instead, the legal analysis she presents in support of her petition is confined to a conclusory assertion that she has a statutory right to intervene, accompanied by several manifestly inapposite citations. Where rule 25(c) provided the proper mechanism, if any, for Holli to obtain the relief she requests, FN10 her petition for extraordinary relief is frivolous on its face.

> FN10. Since rule 38 of the Utah Rules of Appellate Procedure allows the appellate court to independently determine proper substitution of parties, Holli would not have been deprived of her right to seek substitution even if she had brought a proper motion for substitution and the district court had failed to rule on it prior to entry of final judgment. Assuming, without deciding, that a motion for substitution brought just prior to entry of final judgment would not toll the time for filing a notice of appeal, the right to appeal would remain vested in Kelli, and Holli could employ rule 38 to pursue her claim of substitution before the appellate court.

[10] ¶ 13 We therefore turn to the appropriate consequence for filing a frivolous pleading. Rule 33(a) of the Utah Rules of Appellate Procedure provides that "if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages." FN11 Pursuant to this provision, the real-party-in-interest respondents have requested costs and attorney fees. See Utah R. App. P. 33(c)(1). We hold N.A.R. Inc., Mark Olson, Olson & Associates, P.C., Anthony Tidwell, D.D.S., and Olympus View Dental Center are entitled to attorney fees and double costs for the time and resources expended in ***1005** defending against this frivolous petition. We direct the district court to determine the amount of those sanctions and to take whatever other actions it deems appropriate within its jurisdictional authority.

> FN11. For purposes of this rule, "a motion made or appeal taken" necessarily includes all filings that are submitted to this court. Otherwise, parties would be excused from the consequences of filing a frivolous petition for discretionary review.

[11] ¶ 14 We also wish to address Holli's history of consuming judicial resources without demonstrating adequate legal justification. Although certain fees are assessed against parties who avail themselves of the services of the courts, the judiciary of this state is largely funded by the taxpayers. It stands to reason that Holli should not be allowed to harass the judiciary of this state at public expense. While this court does not deem it appropriate at this time to assess a fine specifically designed to compensate the state for the resources Holli has consumed with frivolous litigation, there remains the matter of filing fees. Ordinarily, where litigants cannot afford to pay a filing fee, that fee is waived so that poverty will not create a de facto barrier to access to the courts. Holli routinely has taken advantage of the affidavit of impecuniosity to obtain virtually cost-free access to this court. Under the unusual circumstances of this case, and in light of her previous multitude of filings, this court enters the following ruling directed to the Clerk of the Utah Supreme Court: In any future filing of a petition for discretionary review by Holli Lundahl, the Clerk shall allow only a *conditional* waiver of the filing fee. In the event Holli's pleadings violate rule 33 of the Rules of Appellate Procedure, the conditional waiver of the fee will be revoked and Holli Lundahl will be barred from submitting any future filing of a petition for discretionary review until the filing fee is paid.

¶ 15 Furthermore, any motion for sanctions brought by an opposing party, or on the court's own motion,

shall be judged by the standard set forth above. Specifically, Holli shall not receive any leniency of treatment based merely on nominal pro se status. Other courts of this state may take note of our ruling and respond appropriately. The courts of this state possess the powers necessary to maintain the orderly disposition of matters brought before them, including the power to levy sanctions and, in appropriate cases, to hold in contempt the parties who appear before them.

¶ 16 In conclusion, we emphasize any prospective penalties will be applicable only to cases where Holli Lundahl fails to meet the threshold requirements of applicable laws and court rules. Any party who comes before the courts is obliged to abide by these in any event. Thus, the prospective portion of our ruling does not mandate sanctions per se, but *merely constitutes a reminder and a warning that* such sanctions are available and applicable. Holli Lundahl's privilege to access to the courts will be preserved in direct proportion to her willingness to accept the responsibilities accompanying that privilege.

¶ 17 Justice PARRISH does not participate herein.
Utah,2003.
Lundahl v. Quinn
67 P.3d 1000, 470 Utah Adv. Rep. 28, 2003 UT 11

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award property that does not belong to Husband. Furthermore, the findings of fact do not support the trial court's conclusion that Wife contributed to the growth in equity sufficiently to entitle her to an award of any portion of the equity. ***1026** We reverse the trial court's award of one-half of A & D's increased equity and remand for adjustments in other portions of the decree necessitated by this decision. We also reverse and remand for reconsideration the trial court's attorney fee award in favor of Wife because the trial court failed to enter findings on all of the required factors.

¶ 20 I CONCUR: Judith M. Billings, Judge.ORME, Judge (concurring specially):

¶ 21 I agree with the analysis in Parts I(B) and II of the lead opinion. I concur in the decision to remand the case so that the trial court can adjust its decree, if necessary, in light of our reversal of the award to Wife of the increased value of the equity in A & D. I also agree that, once this has been accomplished, the trial court should reconsider the award of attorney fees in the context of making adequate factual findings on the required criteria. The primary focus will, necessarily, be on Wife's need for assistance in paying her attorney fees given the property division and support provisions of the revised decree.

¶ 22 I do not join in Part I(A) of the lead opinion-not so much because I disagree with the analysis but because it is completely unnecessary to reach the issue treated in Part I(A) in view of our resolution in Part I(B). In Part I(B) we hold Wife has no claim on the increased value of the equity in A & D because her contributions to the marriage in child-rearing and homemaking are not the kind of business- or investment-related contributions envisioned in the line of cases beginning with *Mortensen v. Mortensen,* 760 P.2d 304 (Utah 1988), as warranting an award of one spouse's separate property to the other spouse. Thus, it simply does not matter, in the posture of this case, whether Husband owns all or only some of the stock in A & D or whether the increased value identified by the trial court is attributable to all issued shares or only the shares held beneficially by Husband. I could see the need to opine on these matters if we held in Part I(B) that Wife had some claim on the equity in A & D and the question then arose as to what portion of A & D's equity actually belonged to Husband and was thus awardable, in whole or in part, to Wife. But Husband's ownership percentage just does not matter in this divorce proceeding once we hold Wife has no claim on any of the equity in A & D.

¶ 23 The ownership interests of Husband, his brother, and his mother may need to be sorted out among themselves, but no findings the trial court made in this regard are binding in any way on the brother, the mother, or the corporation, given that they were not parties. Accordingly, there is no reason for us to deal with the stock ownership issue beyond making this simple observation.

Utah App.,2009.
Jensen v. Jensen
203 P.3d 1020, 620 Utah Adv. Rep. 56, 2009 UT App 1

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Supreme Court of Utah.
Brett W. NELSON, Plaintiff and Respondent,
v.
Jeff JACOBSEN, Defendant and Appellant.
No. 17667.

Aug. 31, 1983.

Action was instituted for alleged alienation of wife's affections. The Sixth District Court, Sanpete County, Don V. Tibbs, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court, Oaks, J., held that: (1) notice of trial described nature of proceedings against unrepresented defendant in such ambiguous terms that it deprived him of adequate time to prepare for his defense in violation of his right to due process; (2) an action for alienation of affections was still a viable cause of action in Utah, but in order for plaintiff to recover, it was necessary to establish that causal effect of defendant's conduct outweighed combined effect of all other causes, including conduct of plaintiff and alienated spouse; (3) punitive damages were recoverable as long as plaintiff showed circumstances of aggravation in addition to malice implied by law from conduct of defendant in causing separation of plaintiff and his spouse; and (4) an award of punitive damages could not be entered, however, without first adducing evidence or making findings of fact with regard to defendant's net worth or income.

Reversed and remanded.

Hall, C.J., and Stewart, J., concurred in part and dissented in part and filed separate opinions.

Durham, J., concurred in result and dissented in part and filed opinion.

West Headnotes

[1] Constitutional Law 92 ⚿3881

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3881 k. Notice. Most Cited Cases
(Formerly 92k251.6)
A party is deprived of due process where notice is ambiguous or inadequate to inform a party of nature of proceeding against him or is not given sufficiently in advance of proceeding to permit preparation. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 ⚿3881

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3881 k. Notice. Most Cited Cases
(Formerly 92k251.6)
To satisfy an essential requisite of procedural due process, a "hearing" must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚿3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251.5)
"Due process" is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances, but is a concept which rests upon basic fairness and demands a procedure that is appropriate to case and just to parties involved. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⚿3993

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3991 Trial
92k3993 k. Time of Trial. Most Cited Cases
(Formerly 92k314)
Notice of trial given an unrepresented defendant in form of an oral statement that case had been set for "hearing" two weeks later was not a clear notice that defendant, who was uneducated and inexperienced, had to be ready for "trial" on that date and, hence, was so ambiguous as to deprive defendant of adequate time to prepare his defense in violation of his constitutional right to due process. U.S.C.A. Const.Amend. 14.

[5] Attorney and Client 45 ⚿62

45 Attorney and Client
45II Retainer and Authority
45k62 k. Rights of Litigants to Act in Person or by Attorney. Most Cited Cases
A layman is entitled to undertake his own representation, but due to his lack of technical knowledge of law and procedure, he should be accorded every consideration that may reasonably be indulged and, though this would not include interrupting course of proceedings to translate legal terms, explain legal rules, or otherwise attempting to redress ongoing consequences of layman's decision to function in a capacity for which he was not trained, it would include informing layman of date of trial more than two days before it was to begin and advising him of such matters as his right to a trial by jury and right to require any previously retained counsel to provide case file and other documents whose preparation had been covered by prior representation. U.S.C.A. Const.Amend. 14.

[6] Husband and Wife 205 ⚿324

205 Husband and Wife
205X Enticing and Alienating
205k323 Right of Action
205k324 k. By Husband. Most Cited Cases

Husband and Wife 205 ⚿325

205 Husband and Wife
205X Enticing and Alienating
205k323 Right of Action
205k325 k. By Wife. Most Cited Cases
Right to recover for alienation of affections now extends to both spouses equally and, rather than being based on premise that either spouse constitutes the "property" of the other, is based on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection.

[7] Husband and Wife 205 ⚿322

205 Husband and Wife
205X Enticing and Alienating
205k322 k. Nature and Form of Remedy. Most Cited Cases
A suit for alienation of affections does not attempt to "preserve" or "protect" a marriage from interference, but serves only to compensate a spouse who has sustained loss and injury to his or her marital relationship through the intentional interference of a third party.

[8] Husband and Wife 205 ⚿323.1

205 Husband and Wife
205X Enticing and Alienating
205k323 Right of Action
205k323.1 k. In General. Most Cited Cases
(Formerly 205k323)
Even if some alienation actions are motivated primarily by spite or extortion, there is no basis on which to abolish cause of action altogether, since a plaintiff who institutes a groundless or collusive suit is subject to a suit or counterclaim for abuse of process or malicious prosecution, and there can be no recovery against a defendant whose conduct is

IN THE UTAH COURT OF APPEALS

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Lonnie Paulos and Advanced Orthopedics & Sports Medicine, LLC, Plaintiffs and Appellants, v. All My Sons Moving and Storage, S&B Storage, John Siddoway, and John Does 1-10, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080196-CA F I L E D (December 18, 2008) 2008 UT App 462

Third District, Salt Lake Department, 060903698
The Honorable Stephen L. Henriod

Attorneys: Richard S. Nemelka and Stephen R. Nemelka, Salt Lake City, for Appellants
Stephen D. Spencer and Nathan Whittaker, Murray, for Appellee All My Sons Moving and Storage
Randy S. Ludlow, Salt Lake City, for Appellees S&B Storage and John Siddoway

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Before Judges Thorne, Davis, and Orme.

DAVIS, Judge:

Plaintiffs Lonnie Paulos and Advanced Orthopedics & Sports Medicine, LLC (Paulos) argue that the trial court abused its discretion in dismissing this case with prejudice after Paulos's attorney, Richard S. Nemelka, failed to appear on the first day of the scheduled bench trial. Defendants All My Sons Moving and Storage, S&B Storage, and John Siddoway argue that dismissal was a proper exercise of the trial court's discretion.[1] We reverse and remand.

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1. Defendants initially argue that we do not have jurisdiction to hear this case due to an untimely appeal. The final orders in this case were issued January 8, 2008. See generally Promax Dev. Corp. v. Raile, 2000 UT 4, ¶ 15, 998 P.2d 254 ("[A] trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule of Appellate Procedure 3."). Three days later, Paulos filed a motion for a new trial, which tolls the time for appeal. See Hume v. Small Claims Court, 590 P.2d 309, 311 (Utah 1979). The district court denied that motion on February 21, 2008, and Paulos filed a notice of appeal on February 29, 2008. Thus, the appeal is timely and we have jurisdiction to hear it.

"It is well established that under Rule 41(b) of the Utah Rules of Civil Procedure, a trial court has the discretion to dismiss an action with prejudice for failure to prosecute without justifiable excuse." Rohan v. Boseman, 2002 UT App 109, ¶ 28, 46 P.3d 753 (footnote omitted); see also Utah R. Civ. P. 41(b) ("For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."). Paulos did not meet his burden of giving a justifiable excuse for Mr. Nemelka's failure to appear. Mr. Nemelka was present when the trial date was rescheduled to start November 5, 2007, and he cannot rely on subsequent pleadings generated by him that simply perpetrated his mistake. Mr. Nemelka was also aware that there was a discrepancy between when he thought the trial would start and when opposing counsel thought the trial would start. This was sufficient to put Mr. Nemelka on notice and require some action on his part to directly confirm the correct date with the trial court. Thus, the trial court had discretion to dismiss the case under rule 41(b).

"However, the trial court's discretion 'must be balanced against' the priority of 'afford[ing] disputants an opportunity to be heard and to do justice between them.'" Rohan, 2002 UT App 109, ¶ 28 (alteration in original) (quoting Maxfield v. Rushton, 779 P.2d 237, 239 (Utah Ct. App. 1989)). To determine whether the trial court abused such discretion, we consider five factors:

> "(1) The conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal."

Id. (quoting Maxfield, 779 P.2d at 239).

Defendants argue that the first three factors support dismissal because while Defendants were diligently moving the case forward to trial, including one of Defendants' attorneys forgoing a trip to avoid further postponing trial, Mr. Nemelka created several delays. These alleged delays include once changing the date of depositions due to a scheduling conflict; later scheduling a hearing to stop those depositions from occurring; failing to appear at the hearing on the contested depositions due to a scheduling conflict; delaying a response to a summary judgment motion based on the depositions; initially requesting a later trial date because of a conflict with his personal activities; and failing to appear on the first day of trial. The majority of these actions are familiar delays in litigation, and we are not convinced that these actions were

particularly egregious and show that Paulos "'had ample opportunity to litigate [his] case . . . but abused such opportunity.'" See id. ¶ 32 (quoting Hill v. Dickerson, 839 P.2d 309, 312 (Utah Ct. App. 1992)). Moreover, the trial court, which did not explain in its initial order why it chose the harsh sanction of dismissal with prejudice, only mentioned as dilatory actions that Mr. Nemelka did not appear on the first day of trial and that the trial had previously been rescheduled at his request. Indeed, although the later order denying Paulos's motion to set aside the dismissal was originally drafted by Defendants to characterize Mr. Nemelka's actions as "multiple delays and recklessness in conducting this litigation," the trial court edited the phrase to simply read "delays in conducting this litigation."

As to the fourth factor, Defendants claim that they would have been prejudiced by postponing trial because they would have needed to subpoena all of their witnesses again and prepare for trial a second time. Assuming that three days were required for the trial, this assertion is true. However, that prejudice could have been mitigated by holding the bench trial during the two scheduled days that Mr. Nemelka was prepared to attend, taking witnesses out of order if necessary, and continuing only one day of the trial to a later date if that proved necessary. And any monetary cost of such a solution could have been reclaimed through an appropriate award of attorney fees and costs. Defendants also argue that they would have suffered prejudice because there is a proceeding in Delaware involving one of Defendants and that proceeding "depends on the outcome in this case." But Defendants do no more than allege this as prejudice and do not explain how the existence of this separate proceeding would equate to suffering prejudice via a postponement in this case. It is therefore impossible for us to weigh this claim of prejudice.

The final and most important factor is the injustice that may result from dismissal. The injustice to Paulos here is particularly heavy, leaving him without his day in court and with no avenue of relief against Defendants. Thus, when combining the factors, considering the relatively routine nature of most of the complained of delays, the extent to which the prejudice to Defendants may have been cured by an appropriate award of attorney fees and costs, and the severe injustice to Paulos resulting from a dismissal, we conclude that the trial court abused its discretion in dismissing Paulos's case with prejudice. Thus, we reverse the dismissal and remand for further proceedings.

Paulos also contests the trial court's award of attorney fees. When a party fails to appear, the trial court may award attorney fees under its authority to control proceedings before it. See Utah Code Ann. § 78A-2-201 (Supp. 2008); Barnard v.

Wassermann, 855 P.2d 243, 249 (Utah 1993) ("[C]ourts of general jurisdiction . . . possess certain inherent power to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court.").[2] Such an award, however, should only be the amount necessary "to compensate for the delay, inconvenience, and expense resulting from [the offending lawyer]'s behavior." Barnard, 855 P.2d at 248; see also Griffith v. Griffith, 1999 UT 78, ¶ 14, 985 P.2d 255. We see no authority for the trial court awarding attorney fees not limited to those incurred as a result of Mr. Nemelka's nonappearance.[3] For example, had the case gone to trial and Defendants prevailed, based upon the pleadings Defendants would not have been entitled to any attorney fees. Similarly, had we affirmed the trial court's dismissal with prejudice, there would be no attorney fees awardable as a result of the nonappearance; indeed, in that scenario, Defendants would have spent less money defending the suit than if Mr. Nemelka had appeared as scheduled. But because we reverse the dismissal of the case, Defendants will have to further defend the case and attorney fees may be awarded to compensate for those fees and costs resulting directly from Mr. Nemelka's nonappearance. These fees and costs should be calculated in light of the fact that trial was scheduled for the following two days, Mr. Nemelka was prepared to appear on those two days, and the monetary cost resulting from Mr. Nemelka's nonappearance could have been mitigated by holding trial those two days, resulting in lower attorney fees and costs than would have been incurred by cancelling the trial in its entirety. We therefore reverse the award of all attorney fees and costs, and we remand this matter to the trial court for an award of attorney

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2. We recognize that the trial court initially categorized its award of attorney fees as fees awarded because the matter was without merit. See generally Utah Code Ann. § 78B-5-825(1) (Supp. 2008) (providing for an award of attorney fees when action is without merit and not brought in good faith). However, the trial court later clarified that no one had alleged that Mr. Nemelka's nonappearance was in bad faith, that the court "ha[d] made no ruling that [Paulos]'s case is without merit," and that the fees were awarded pursuant to the trial court's authority to control the proceedings before it.

3. Defendants' attorneys initially requested only attorney fees "for having to get ready and be here today" and "for trial preparations . . . done in the last 48 hours."

fees and costs limited to those directly resulting from Mr. Nemelka's nonappearance on the first day of trial.[4]

James Z. Davis, Judge

WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

Gregory K. Orme, Judge

4. Defendants' cursory request for attorney fees based on Paulos's alleged inadequate briefing is denied.

H

Court of Appeals of Utah.

Joseph W. ROHAN, Plaintiff and Appellant,

v.

Chad BOSEMAN, a minor; and Jerald Boseman, an individual, Defendants and Appellees.

No. 20001148-CA.

April 11, 2002.

Rehearing Denied May 6, 2002.

Automobile accident victim appealed from order of the District Court, Third District, Salt Lake Department, J. Dennis Frederick, J., dismissing his negligence action with prejudice and awarding costs and fees to defendants. The Court of Appeals, Billings, Associate P.J., held that: (1) trial court acted within its discretion in denying automobile accident victim's request for a continuance; (2) trial court did not exceed its discretion in denying automobile accident victim's motions for a voluntary dismissal; (3) trial court's denial of automobile accident victim's motions did not violate Americans with Disabilities Act (ADA); (4) trial court did not exceed its discretion in dismissing automobile accident victim's action with prejudice; (5) accident victim's motions were frivolous and without basis in law or fact; and (6) sufficient evidence supported trial court's finding that automobile accident victim acted in bad faith.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇨962

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k962 k. Dismissal or Nonsuit Before Trial. Most Cited Cases

Appellate court reviews trial court's dismissal with prejudice for failure to prosecute for abuse of discretion.

[2] Appeal and Error 30 ⇨842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases

Appellate court reviews questions of law for correctness.

[3] Appeal and Error 30 ⇨842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases

Whether attorney fees are recoverable is a question of law that appellate court reviews for correctness.

[4] Pretrial Procedure 307A ⇨716

307A Pretrial Procedure
307AIV Continuance
307Ak716 k. Absence, Death, or Disability of Counsel. Most Cited Cases

Trial court acted within its discretion in denying automobile accident victim's request for a continuance so that new counsel could prepare for trial in negligence action, where victim was also an attorney, was aware of his brain injury, and waited until 18 days before trial, and four months after court put him on notice that he must prosecute his case, before requesting a continuance and to formally substitute counsel.

[5] Pretrial Procedure 307A ⚿506.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(A) Voluntary Dismissal
307Ak506 Time for Dismissal; Condition of Cause
307Ak506.1 k. In General. Most Cited Cases

Trial court did not exceed its discretion in denying automobile accident victim's motions for a voluntary dismissal of negligence action, where motion was made two weeks before trial, accident victim had voluntarily discharged counsel just prior to trial, and defendants had incurred expenses in preparing for trial. Rules Civ.Proc., Rule 41.

[6] Civil Rights 78 ⚿1056

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1056 k. Courts and Judicial Proceedings. Most Cited Cases
(Formerly 78k116, 78k107(1))

Trial court's denial of automobile accident victim's motions for continuance or voluntary dismissal did not violate Americans with Disabilities Act (ADA); even though accident victim, who was also an attorney, suffered a closed brain injury, trial court's denial of motions were occasioned not by accident victim's disability, but by his refusing to prosecute his case in a timely manner through his counsel of record and as a sanction for his dilatory conduct. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[7] Appeal and Error 30 ⚿1079

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient Discussion of Objections. Most Cited Cases

Appellate court declined to consider automobile accident victim's claims that trial court's denial of his motions for a continuance or voluntary dismissal violated his right to due process and equal protection under the United States Constitution and right to due process, uniform operation of laws, and access to the courts under the state constitution; because accident victim's brief failed to adequately set forth an argument. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, §§ 7, 11; Rules App.Proc., Rule 24(a)(9).

[8] Pretrial Procedure 307A ⚿583

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)3 Want of Prosecution
307Ak583 k. Power and Discretion of Court in General. Most Cited Cases

Under rule governing dismissal of actions, a trial court has the discretion to dismiss an action with prejudice for failure to prosecute without justifiable excuse; this discretion must be balanced against the priority of affording disputants an opportunity to be heard and to do justice between them. Rules Civ.Proc., Rule 41(b).

[9] Pretrial Procedure 307A ⚿683

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak682 Evidence
307Ak683 k. Presumptions and Burden of Proof. Most Cited Cases

Party challenging dismissal for failure to prosecute bears the burden of offering a reasonable excuse for his or her lack of diligence. Rules Civ.Proc., Rule 41(b).

[10] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
Appellate court considers the following factors in determining whether a trial court exceeded its discretion in dismissing for failure to prosecute: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal.

[11] Pretrial Procedure 307A ⚿583

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)3 Want of Prosecution
307Ak583 k. Power and Discretion of Court in General. Most Cited Cases
Even where a trial court finds facts indicating that injustice could result from the dismissal of a case for failure to prosecute, it can dismiss when a plaintiff has had more than ample opportunity to prove his or her asserted interest and simply failed to do so. Rules Civ.Proc., Rule 41(b).

[12] Pretrial Procedure 307A ⚿587

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)3 Want of Prosecution
307Ak587 k. Particular Applications, Delay or Time Limitation. Most Cited Cases

Pretrial Procedure 307A ⚿690

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak690 k. Dismissal with or Without Prejudice. Most Cited Cases
Trial court did not exceed its discretion in dismissing automobile accident victim's action with prejudice for failure to prosecute; accident victim, who was an attorney, had ample opportunity to litigate but abused his opportunity when he represented that he was ready for trial and then later dismissed counsel and sought more experienced counsel within weeks of trial. Rules Civ.Proc., Rule 41(b).

[13] Costs 102 ⚿194.16

102 Costs
102VIII Attorney Fees
102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases
Ordinarily attorney fees are awarded only if authorized by a statutory or contractual provision.

[14] Appeal and Error 30 ⚿766

30 Appeal and Error
30XII Briefs
30k766 k. Defects, Objections, and Amendments. Most Cited Cases
Appellate court could assume that record supported trial court's findings, upon which its award of attorney fees were based, that automobile accident victim acted in bad faith and was dilatory in automobile accident action, because accident victim failed meet requirement to marshal the evidence, citing the appellate court to all the evidence supporting trial court's ruling.

[15] Costs 102 ⚿194.44

102 Costs
102VIII Attorney Fees
102k194.44 k. Bad Faith or Meritless Litigation. Most Cited Cases
Automobile accident victim's motions, filed day before trial, for continuance or voluntary dismissal based on claim that he was entitled to motions under Americans with Disabilities Act (ADA) due to head injury, were frivolous and without basis in law

or fact, and thus supported an award of attorney fees. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; U.C.A.1953, 78-27-56.

[16] Costs 102 ⚿194.44

102 Costs
102VIII Attorney Fees
102k194.44 k. Bad Faith or Meritless Litigation. Most Cited Cases
In regards to an award of attorney fees, to find that a party acted without good faith, the trial court is required to find that he: (1) lacked an honest belief in the propriety of the activities in question; or (2) intended to take unconscionable advantage of others; or (3) intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. U.C.A.1953, 78-27-56.

[17] Costs 102 ⚿207

102 Costs
102IX Taxation
102k207 k. Evidence as to Items. Most Cited Cases
Sufficient evidence supported trial court's finding that automobile accident victim acted in bad faith in his negligence action, as necessary to support an award of attorney fees, where accident victim indicated that he was ready for trial, then later dismissed counsel and sought more experienced counsel within weeks of trial, and, appearing pro se, appeared for trial without witnesses and unprepared to proceed. U.C.A.1953, 78-27-56.
***754** Joseph W. Rohan, Halliday & Watkins, PC, Salt Lake City, Appellant Pro Se.

***755** Mark S. Gustavson, Sandy, and Robert L. Jeffs and Rodney W. Rivers, Jeffs & Jeffs, Provo, for Appellees.

Before JACKSON, P.J., and BILLINGS, Associate P.J. and DAVIS, J.

OPINION

BILLINGS, Associate Presiding Judge:

¶ 1 Joseph W. Rohan (Rohan) appeals the trial court's dismissal of his negligence action and award of attorney fees and costs to Chad and Gerald Boseman (the Bosemans). We affirm.

BACKGROUND

¶ 2 In January 1997, Rohan suffered head injuries in a vehicular accident involving Chad Boseman. In April 1997, Rohan learned he had a closed brain injury.

¶ 3 Following the accident, Rohan, a licensed Utah attorney, continued to practice law with Halliday & Watkins, P.C. In early 1998, Rohan retained Halliday & Watkins to represent him in a negligence action against the Bosemans. On April 23, 1998, Rohan, through Halliday & Watkins, filed a complaint. Thereafter, the parties proceeded to conduct settlement negotiations and discovery. In an August 1999 letter, Rohan, through Halliday & Watkins, informed the Bosemans that he intended to terminate settlement negotiations and proceed to trial.

¶ 4 On October 28, 1999, a year and a half after Rohan's complaint was filed, the trial court issued an order to show cause as to why Rohan's action should not be dismissed for failure to prosecute. Following a hearing in November 1999, the trial court continued the order to show cause for sixty days.

¶ 5 On January 19, 2000, Rohan, through Halliday & Watkins, filed a certificate of readiness for trial. The Bosemans objected arguing, inter alia, that Rohan had failed to provide documents requested in discovery, and consequently, they had been unable to complete Rohan's deposition. They requested 120 days to complete discovery.

¶ 6 In a conference on March 2, 2000, the trial court scheduled a final pretrial conference for June

5 and trial for June 20-23, 2000. The court ordered the parties to complete discovery by May 26, 2000.

¶ 7 After the scheduling conference, the Bosemans filed a motion to compel production of the documents they had previously requested from Rohan. The motion was granted. Later in March, both parties designated trial witnesses and exhibits. Rohan's designations were through Halliday & Watkins and included medical experts.

¶ 8 Sometime in March 2000, Rohan concluded that Halliday & Watkins lacked the experience to try his case. Thus, he retained Robert Orton (Orton) of Fabian & Clendenin, P.C. In March and April, Orton attended supplemental depositions; in May, he examined medical records at the office of the Bosemans' counsel. However, Orton never filed a formal appearance in Rohan's action.

¶ 9 A week before the final pretrial conference, Orton informed Rohan that he could not depose experts in time for trial and he would not represent Rohan without a continuance. Thus, on June 2, 2000, Rohan filed a pro se motion to continue trial for ninety days and to extend discovery for sixty days so that Orton could "identify supplemental expert and fact witnesses," "conduct further discovery," and prepare for trial. In the motion, Rohan also sought the withdrawal of Holliday & Watkins and to substitute Orton as counsel.

¶ 10 At the final pretrial conference on June 5, 2000, Halliday & Watkins appeared on Rohan's behalf. The trial court took Rohan's motion to continue under advisement, but instructed the parties and counsel to prepare for trial. Later that day, the court denied the continuance because Rohan had failed to establish good cause as required by Utah law and because, under the circumstances, fifteen days[FN1] before trial was too late to substitute counsel.

> FN1. The motion to continue and substitute counsel was actually filed eighteen days before trial.

¶ 11 On June 6, 2000, Rohan filed a pro se notice of discharge and discharged Halliday & Watkins. The next day, he filed a pro se motion for a voluntary dismissal, arguing he ***756** lacked counsel and it would be manifestly unfair to require him to try his own brain injury case. The Bosemans opposed the motion arguing, inter alia, Rohan voluntarily discharged his counsel, he could not claim surprise with respect to his counsels' lack of experience, and they would suffer prejudice if Rohan's motion were granted. The trial court summarily denied the motion for the reasons specified in the Bosemans' objection.

¶ 12 On June 15, 2000, Rohan filed a notice of inability to bring his case to trial. The Bosemans responded that unless otherwise informed by the court, they would continue to prepare for trial. On June 19, 2000, the day before trial, Rohan filed a renewed motion for a continuance and voluntary dismissal, arguing the trial court's refusal to grant the renewed motion would violate the Americans with Disabilities Act (ADA).

¶ 13 Rohan appeared pro se at trial. At the outset, the court denied the renewed motion, concluding Rohan's assertion that the ADA required the court to grant a continuance or voluntary dismissal was without basis in law and fact. Rohan informed the court that he did not have any witnesses and was not prepared to proceed. Consequently, the Bosemans made a motion to dismiss the case with prejudice for failure to prosecute. The trial court granted the motion and awarded the Bosemans' attorney fees and costs incurred as a result of Rohan's "willful failure or refusal" to proceed with trial.

¶ 14 On August 7, 2000, Rohan filed a pro se motion for a new trial, primarily asserting the dismissal with prejudice violated the ADA, but also asserting the dismissal violated the United States and Utah Constitutions. The trial court denied the motion. Rohan appeals.

ISSUES AND STANDARDS OF REVIEW

[1] ¶ 15 Rohan argues the trial court erred in denying his motions for a continuance and voluntary dismissal and in dismissing his case with prejudice for failure to prosecute. We review these actions of the trial court for abuse of discretion. *See Brown v. Glover,* 2000 UT 89,¶ 43, 16 P.3d 540; *Harmon v Greenwood,* 596 P.2d 636, 639-40 (Utah 1979); *Maxfield v. Rushton,* 779 P.2d 237, 239 (Utah Ct.App.1989).

[2] ¶ 16 Rohan also argues he was entitled to a continuance or dismissal without prejudice under the ADA. He additionally argues the denial of his motions violates his right to due process and equal protection under the United States and Utah Constitutions. These issues present questions of law that we review for correctness. *See, e.g., State v Mast,* 2001 UT App 402,¶¶ 7-8, 40 P.3d 1143.

[3] ¶ 17 Finally, Rohan argues the trial court erred in awarding attorney fees and costs to the Bosemans. Whether attorney fees are recoverable in the present case is a question of law that we review for correctness. *See, e.g., Warner v. DMG Color, Inc.,* 2000 UT 102,¶ 21, 20 P.3d 868.

ANALYSIS

I. Did the Trial Court Exceed Its Discretion in Denying Rohan's Motions for a Continuance and Voluntary Dismissal?

¶ 18 Rohan first argues the trial court exceeded its discretion in denying his initial motion for a continuance. In relevant part, Rule 40 of the Utah Rules of Civil Procedure provides that "the court may in its discretion, and upon such terms as may be just, ... postpone a trial ... upon good cause shown." Utah R. Civ. P. 40(b).

[4] ¶ 19 We conclude the trial court acted within its discretion in denying Rohan's initial motion for a continuance, which was based solely upon his desire for more experienced counsel. Rohan was aware that he had a brain injury from the outset, yet he proceeded through his firm, Halliday & Watkins, for more than two years. Then, in March 2000, he concluded he needed more experienced counsel. In November 1999, the trial court put Rohan on notice that he must prosecute his case. This is when Rohan should have decided who would represent him. Instead, Rohan waited until eighteen days before trial, over two years after he filed his complaint, to request a continuance and to formally substitute counsel. Rohan has not offered a reasonable explanation for ***757** his dilatory conduct. Under these circumstances, we cannot say the trial court exceeded its discretion in denying a continuance. *Cf. Hardy v. Hardy,* 776 P.2d 917, 926 (Utah Ct.App.1989) (concluding trial court did not act unreasonably in denying continuance where prosecution of case had been substantially delayed by failure to agree upon expert witnesses and retain new counsel).

[5] ¶ 20 Rohan next argues the trial court exceeded its discretion in denying his renewed motion for a continuance and motions for a voluntary dismissal because it is manifestly unjust to force a party with a brain injury to try his own case. In relevant part, Rule 41 of the Utah Rules of Civil Procedure provides that "an action may only be dismissed at the request of the plaintiff on order of the court based either on: (i) a stipulation of all of the parties who have appeared in the action; or (ii) upon such terms and conditions as the court deems proper." Utah R. Civ. P. 41(a)(2).

¶ 21 In assessing whether the trial court exceeded its discretion, Rohan contends we should adopt the analysis of the Tenth Circuit. In the Tenth Circuit, "[a]bsent 'legal prejudice' to the defendant, the [trial] court normally should grant such a dismissal." *Ohlander v. Larson,* 114 F.3d 1531, 1537 (10th Cir.1997). "[R]elevant factors the [trial] court should consider include: the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal;

C

Court of Appeals of Utah.
Dennis V. SPENCER and Linda S. Spencer, Plaintiffs and Appellants,
v.
PLEASANT VIEW CITY, a Utah municipality; Cherrywood Manor, Inc., a Utah corporation; Cherrywood Manor Home Owners Association, Inc., a Utah corporation; and John and Jane Does I-XX, individual defendants in their private capacities, Defendants and Appellees.
No. 20010927-CA.

Nov. 6, 2003.

Landowners denied request for approval of a subdivision and building permits sued city, alleging slander of title and various state and federal constitutional violations. The Second District Court, Ogden Department, W. Brent West, J., granted summary judgment for city, and landowners appealed. The Court of Appeals, Billings, A.P.J., held that: (1) landowners were not the prevailing party, for purposes of attorney fees, as a result of city's offer to issue building permits after commencement of action; (2) landowners did not have a protected property interest for due process purposes as a result of variances issued 10 years earlier; and (3) landowners did not have a slander of title claim against city.

Affirmed.

West Headnotes

[1] Civil Rights 78 ⇐1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
Landowners were not "prevailing parties" on their federal constitutional claims for equitable relief in action against city, for purposes of an attorney fee award under statute allowing such fees on section 1983 claims; though landowners had claimed city violated Constitution by failing to issue building permits, city offered to issue building permits after landowners sued city, and trial court found the offer rendered landowners' claims moot, trial court did not approve, adopt or ratify city's offer in any official manner, and city's change in conduct lacked the necessary judicial imprimatur. 42 U.S.C.A. §§ 1983, 1988.

[2] Civil Rights 78 ⇐1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
Attorney fees may be claimed by a party in a section 1983 action under the theory that the party succeeded on a non-federal claim pendent to a substantial constitutional claim and which arises from a common nucleus of operative fact. 42 U.S.C.A. §§ 1983, 1988.

[3] Civil Rights 78 ⇐1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
A party can "prevail" for purposes of statute allowing attorney fees on constitutional claims under section 1983 only where there is a judicially sanctioned change in the legal relationship of the parties, as with enforceable judgments on the merits and court-ordered consent decrees. 42 U.S.C.A. § 1988.

[4] Civil Rights 78 ⇐1482

78 Civil Rights
78III Federal Remedies in General

> involves some claim that the [municipality] exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983."

Id. at ¶ 25 (quoting *Creative Environments, Inc v. Estabrook*, 680 F 2d 822, 833 (1st Cir.1982)). Additionally, "absent invidious discrimination, such as proof of racial animus, the 'conventional planning dispute ... is a matter primarily of concern to the state and does not implicate the Constitution.' " *Id.* (quoting *Creative Environments, Inc.*, 680 F.2d at 833).

[10] ¶ 18 The Spencers have not alleged invidious discrimination by the City. Rather, the Spencers argue their original variances warrant federal protection in that "[v]ariances run with the land,"Utah Code Ann. § 10-9-707(4) (1998), and are not subject to revocation. This argument is merely a " 'conventional planning dispute.' " *Patterson*, 2003 UT 7 at ¶ 25 (quoting *Creative Environments, Inc.*, 680 F.2d at 833). Further, the Spencers have not identified a protected property interest to which they are entitled. While the Spencers and the Parkers obtained variances to build on their properties, neither sought to build until nearly ten years after the variances were granted. We have "uncovered no authority that suggests a property owner has a vested property right in a contemplated development or subdivision." *Marshall v Board of County Comm'rs*, 912 F.Supp. 1456, 1464 (D.Wyo.1996). Moreover, the Spencers' argument, taken to its logical conclusion, would allow property owners who fail to act for many years on a granted variance to frustrate a city's ability to update its land use regulations.

¶ 19 The Spencers' case "involves disputes about specific local development issues, not about the deprivation of constitutional rights." *Patterson*, 2003 UT 7 at ¶ 28. "Whatever unfairness [the Spencers] may have experienced, nothing in the facts presented sounds constitutional alarm bells." *Id.* at ¶ 28.[FN7] Thus, we conclude the Spencers failed to establish a property interest protected under 42 U.S.C. § 1983, and therefore the trial court properly granted summary judgment in favor of the City.

> FN7. We limit our holding to the specific facts of this case. We cannot say there will never be a case in which an adverse municipal land use decision against a developer rises to the level of a constitutional violation. However, the facts of this case do not warrant constitutional protection.

III. Federal Takings Claim Inadequately Briefed

[11][12][13] ¶ 20 The Spencers' federal takings claim is inadequately briefed, and we refuse to consider it. "It is well established that a reviewing court will not address arguments that are not adequately briefed." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998).

> In deciding whether an argument has been adequately briefed, we look to ...***552**rule 24(a)(9) of the Utah Rules of Appellate Procedure[, which] states that the argument in the appellant's brief "shall contain the contentions and reasons of the appellant with respect to the issues presented ... with citations to the authorities, statutes and parts of the record relied on." Implicitly, rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority.... [T]his court is *not a depository in which the appealing party may dump the burden of argument and research.*

Id. at 305 (citations omitted) (emphasis added).

¶ 21 Incorrectly labeling their claim as "substantive due process," the Spencers inadequately assert a federal "taking" without just compensation. In cursory fashion, the Spencers argue that a platting error by the City, regarding a right-of-way owned by the

Spencers limiting use of that right-of-way, involved a private rather than public use. Aside from a one sentence quotation to a 1937 takings case, the Spencers cite no case law describing or supporting their claim. There is no reasoned analysis or factual development supporting any legal claim for damages, thus "dump[ing] the burden of argument and research" on this court. *Id.* (quotations and citation omitted). Similarly, the Spencers claim the City's "actions were not related to [its] rationale proffered for conduct." However, the Spencers make no mention of damages or constitutional remedies. The Spencers reference several instances of the City's conduct regarding the Spencers' development attempts without any meaningful discussion of these facts or reasoned analysis as to why the City's conduct amounts to a constitutional taking. Citing one regulatory takings case, the Spencers superficially claim the facts are similar to this case, with no further analysis or mention of the elements of a regulatory takings. Therefore, the federal takings claim fails.[FN8]

FN8. The Spencers' cursory and conclusory arguments that the City violated Article 1, Section 7; Article 1, Section 22; and Article XI, Section 5 of the Utah Constitution also fail for inadequate briefing.

IV. Slander of Title

¶ 22 The Spencers argue that their slander of title claim against the City should have survived summary judgment. The trial court dismissed this claim because, inter alia, the Spencers failed to establish a "factual or legal basis" for their assertions. The Spencers do not argue a cognizable claim on appeal, and we therefore affirm the trial court's ruling.

[14][15] ¶ 23"To prove slander of title, a claimant must [show] that (1) there was a publication of a slanderous statement disparaging [the] claimant's title, (2) the statement was false, (3) the statement was made with malice, and (4) the statement caused actual or special damages." *First Sec. Bank of Utah v. Banberry Crossing,* 780 P.2d 1253, 1256-57 (Utah 1989). In their brief, the Spencers refer to "collective city statements" that "denigrated the validity of Spencers' real property," but do not provide any details about those statements or how they satisfy the first element. For the second element, the Spencers assert in conclusory fashion that the City's statements "were false." In asserting malice, the Spencers cite the standard but do not apply it to the facts, arguing only that, "taken in context," the statements were malicious. The Spencers also inadequately argue special damages. Thus, the Spencers' slander of title claim fails.

CONCLUSION

¶ 24 We conclude the Spencers are not entitled to "prevailing party" attorney fees. Further, the Spencers fail to articulate any legitimate constitutional claims against the City. The Spencers' slander of title claim also fails. Therefore, we affirm.

¶ 25 WE CONCUR: NORMAN H. JACKSON, Presiding Judge and WILLIAM A. THORNE JR., Judge.

Utah App.,2003.
Spencer v. Pleasant View City
80 P.3d 546, 486 Utah Adv. Rep. 30, 2003 UT App 379

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Supreme Court of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Donald Wayne BROWN, Defendant and Appellant.
No. 900148.

Nov. 30, 1992.
Rehearing Denied June 17, 1993.

Defendant was convicted in the District Court, Box Elder County, Franklin L. Gunnell, J., of second-degree murder and aggravated assault. Defendant appealed. The Supreme Court, Durham, J., held that: (1) business owner had authority to consent to search of trailer used to house defendant; (2) appointment of part-time prosecutor as defense counsel warranted new trial; (3) admission of prior bad acts evidence was not plain error; and (4) evidence was sufficient to support conviction for aggravated assault.

Reversed and remanded.

Stewart, J., concurred with opinion.

Hall, C.J., dissented with opinion.

West Headnotes

[1] Criminal Law 110 ⚿1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
Supreme Court uses plain error standard to review issues raised for first time on appeal.

[2] Searches and Seizures 349 ⚿174

349 Searches and Seizures
349V Waiver and Consent
349k173 Persons Giving Consent
349k174 k. Owners of Property; Hosts and Guests. Most Cited Cases
Business owner had authority to consent to search of trailer used to house defendant; trailer had "common area" used by all employees of business, owner had unrestricted right of access to at least common area in trailer, all items seized were in plain sight, none were hidden and none were in area in sole possession of defendant. U.S.C.A. Const.Amend. 4.

[3] Criminal Law 110 ⚿1130(6)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(6) k. Reply Briefs. Most Cited Cases
Defendant's failure to include state constitutional analysis in his opening brief (and state's subsequent failure to include such analysis in its response brief) precluded review of state constitutional analysis added to defendant's response brief; otherwise, state would be placed in difficult position in future cases of either missing opportunity to brief state constitutional law issue or having to construct and then rebut an unbriefed issue.

[4] Searches and Seizures 349 ⚿24

349 Searches and Seizures
349I In General
349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases
Warrantless searches are per se unreasonable unless undertaken pursuant to recognized exception to warrant requirement. U.S.C.A. Const.Amend. 4.

This amended opinion is subject to revision before publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Wolfgango Ruiz, Defendant and Appellant.	AMENDED OPINION[1] (For Official Publication) Case No. 20071003-CA F I L E D (May 7, 2009) 2009 UT App 121

Third District, Salt Lake Department, 051906181
The Honorable Randall N. Skanchy

Attorneys: Hakeem Ishola, West Valley City, for Appellant
Mark L. Shurtleff and Laura B. Dupaix, Salt Lake City, for Appellee

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Before Judges Greenwood, Thorne, and Orme.

ORME, Judge:

¶1 Wolfgango Ruiz timely sought to withdraw his guilty plea. His motion was granted. On reconsideration by a different judge, that disposition was rescinded and the motion was denied. We reverse that denial.

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1. This Amended Opinion replaces our Opinion issued on December 26, 2008, see State v. Ruiz, 2008 UT App 470, 620 Utah Adv. Rep. 41. We address the State's arguments raised in its petition for rehearing, see infra ¶¶ 16-23, and decline to delete the language to which the State takes exception for the reasons outlined in the final section of this opinion. See Utah R. App. P. 35(c) ("If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case."). Aside from this explanatory footnote, our opinion resolving this appeal remains exactly the same except for the addition of the section entitled "On Petition for Rehearing."

Appeals Ct can rule

IN THE UTAH COURT OF APPEALS

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Chris Wall and Tara Wall, Plaintiffs and Appellees, v. Tamera Palmer, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080758-CA F I L E D (May 14, 2009) 2009 UT App 129

Fourth District, Nephi Department, 080600135
The Honorable Donald J. Eyre Jr.

Attorneys: Tamera Palmer, Nephi, Appellant Pro Se
Chris Wall and Tara Wall, Payson, Appellees Pro Se

Before Judges Thorne, Bench, and Orme.

PER CURIAM:

Tamera Palmer appeals the district court's August 26, 2008 judgment. We affirm.

Rule 24(a) of the Utah Rules of Appellate Procedure requires, among other things, that all appellate briefs submitted contain a table of contents, a table of authorities, a statement of jurisdiction, a statement of the issues presented for appeal, including the standard of appellate review with supporting authority, and proper citations to the record. See Utah R. App. P. 24(a). Rule 24(a)(9) also requires that all appellate briefs contain proper legal analysis with citations to relevant legal authority supporting the arguments raised therein. See id. R. 24(a)(9).

An appellate court is not a depository in which parties may dump the burden of their argument and research. See Smith v. Four Corners Mental Health Ctr., Inc., 2003 UT 23, ¶ 46, 70 P.3d 904. The appellant, in his or her brief, bears the burden of demonstrating with appropriate legal argument that the district court erred. See State v. Price, 827 P.2d 247, 250 (Utah Ct. App. 1992). This court may decline to consider the merits of an appeal if a party fails to cite relevant legal authority and also fails to provide meaningful legal analysis pertaining to the *

facts of his or her case. See State v. Shepherd, 1999 UT App 305, ¶ 25, 989 P.2d 503. Although Utah appellate courts are reluctant to penalize self-represented litigants for technical rule violations, the court will not assume a party's burden of argument and research. See Allen v. Friel, 2008 UT 56, ¶ 9, 194 P.3d 903.

This court notified Palmer of the briefing requirements. Despite this court's request that Palmer comply with the briefing requirements, Palmer declined to file a proper brief. Palmer's brief raises seven issues. However, her argument section is limited to six paragraphs which do not pertain to the legal issues that she raises on appeal or satisfy her burden of convincing this court that the underlying court erred. Palmer's brief fails to raise any legal argument, which if well-taken, would entitle her to reversal of the district court's judgment.

Accordingly, the district court's August 26, 2008 judgment is affirmed.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge